(9)

No. 98-262
In the Supreme Court of the United States
October Term, 1998

KENNETH L. McGINNIS, et al,

Petitioners,

v.

EVERETT HADIX, et al,

Respondents.

On Writ of Certiorari To The United States
Court Of Appeals For The Sixth Circuit

JOINT APPENDIX

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Petition for Certiorari filed August 6, 1998
Certiorari granted November 16, 1998

221PP

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EVERETT HADIX, et al,

Plaintiffs

v.

PERRY JOHNSON, et al,

Defendants

_____/

THE UNITED STATES DISTRICT COURT OF THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
NO. 80-73581

SELECTED DOCKET ENTRIES

Sept 18, 1980	2	Complaint filed, no summons issued. DD 9/18/90
Sept 24, 1986	353	MAGISTRATE'S Special Master Report and Recommendation with appendix. (see report)
11/19/87	773	ORDER by Judge John Feikens, regarding monitoring fees (Copy of order that was originally omitted from docket) (lh) [Entry date 02/05/91]
4/24/92	831	AMENDED STIPULATION and order by Judge John Feikens regarding attorney fees and costs. (1052) [Entry date 4/28/92]
6/14/93	926	MEMORANDUM opinion and order by Judge John Feikens granting petition by Neal Bush, Michael J. Barnhart, Deborah A. LaBelle, Patricia A. Streeter for attorney fees and costs [906-1] and awarding Mr. Barnhart $8,370.50, Ms. Streeter $734.69, Ms.

		LaBelle $10,929.00 and Mr. Bush $13,343.80 with appendix and proof of mailing (1076) [Entry date 06/15/93]
5/30/96	1067	ORDER by Judge John Feikens granting motion for attorney fees by plaintiffs [1052-1] (1074) [Entry date 06/04/96]
9/13/96	1122	MOTION by plaintiffs for attorneys fees with brief and exhibits (1172) [Entry date 09/16/96]
10/10/96	1132	RESPONSE by defendants' to motion for attorney fees by plaintiffs [1122-1] with proof of service (1074) [Entry date 10/17/96]
10/25/96	1134	REPLY by plaintiff to response to motion for attorney fees by plaintiffs [1122-1] with attachment and proof of mailing (1172) [Entry date 10/28/96]
12/4/96	1146	ORDER by Judge John Feikens that the PLRA's limits on attorney fees apply to this case for work performed after the PLRA's enactment on 4/26/96; the plaintiffs re-submit fee requests for work performed between 1/1/96 and 6/30/96 in which counsel's fees are limited to $112.50 per hour for time worked after 4/26/96; upon receiving the revised request defendants pay plaintiffs counsel for the contested 23 hours' work provided (RH) [Entry date 12/05/96]
12/20/96	1151	APPEAL by defendant of order [1146-1] to USCA - FEE: paid (no receipt number given) (pr) [Entry date 12/23/96]

12/20/96	1154	CROSS-APPEAL by plaintiffs of order [1146-1] to USCA FEE: paid Receipt #: 21374 (pr) [Entry date 12/23/96]

GENERAL DOCKET FOR Sixth Circuit Court of Appeals

Court of Appeals Docket #: 96-2567
Nsuit: 3550 Prisoner: Civil Rights
Hadix v. Johnson
Appeal from: Eastern District of Michigan at Detroit

- -

Case type information:
1) prisoner petition
2) state
3) prisoner civil rights

- -

Lower court information:

District: 0645-2 : 80-73581
Trial Judge: John Feikens
Court Reporter: Elnora Williams
Court Reporter: Karin Dains
Date Filed: 9/18/80
Date order/judgment: 12/5/96
Date NOA filed: 12/20/96

- -

Fee status: paid

- -

Prior cases:
88-1879
Date filed: **/**/** Date disposed: **/**/** Disposition:

Current cases:

	Lead	Member	Start	End
Consolidated:				
	96- 2567	97- 1272	12/15/97	
	96- 2567	96- 2586	12/15/97	
	96- 2567	96- 2588	12/15/97	
Cross-appeal:				
	96- 2567	96- 2568	1/2/97	
	96- 2586	96- 2588	12/31/96	
Related:				
	96- 2567	96- 2582	12/31/96	4/8/98

EVERETT HADIX; et al (96-2567) Plaintiffs - Appellees/Cross-Appellants
v.
PERRY M. JOHNSON; et al (96-2568) Defendants - Appellants/Cross-Appellees.

12/30/96	Prisoner Case Docketed . Notice filed by Appellant Perry M. Johnson. Transcript needed: n (PLRA's limits on attorney fees) (ert) [96-2567]
***	
12/11/97	CAUSE ARGUED on 12/11/97 by Leo H. Friedman for Appellant Cross-Appellee Perry M. Johnson in 96-2567, Deborah A. LaBelle for Appellee Cross-Appellant Everett Hadix in 96-2567 before Judges Kennedy, Jones, Suhrheinrich. [96-2567] (paw) [96-2567]
***	
12/16/97	RULING to consolidate for submission the following cases: 96-2567/2568;96-2586/2588; 97-1272. [96-2567] . (ert) [96-2567]
***	
4/17/98	OPINION filed : AFFIRMED in part REVERSED in part and remanded [96-2567, 96-2568, 96-2586, 96-2588, 97-1272] (remanded for a recalculation of the fee awards in a manner consistent with the opinion of the court); appeal 97-1218 is DISMISSED as moot; decision for publication pursuant to local rule 24 [96-2567, 96-2568, 96-2586, 96-2588, 97-1272, 97-1218] Cornelia G. Kennedy, Circuit Judge, AUTHOR; Nathaniel R. Jones, Circuit Judge; Richard F. Suhrheinrich, Circuit Judge. (ert) [96-2567 96-2568 96-2586 96-2588 97-1272]

4/21/98	JUDGMENT: AFFIRMED in part REVERSED in part and remanded appeal 97-1218 is DISMISSED as moot. (ert) [96-2567 96-2568 96-2586 96-2588 97-1272]
4/22/98	Appellant MOTION filed to extend time to file petition for rehearing until 5/15/98 . . Motion filed by Leo H. Friedman for Appellant Cross-Appellee Perry M. Johnson in 96-2567, Leo H. Friedman for Appellant Cross-Appellee Perry M. Johnson in 96-2568, Leo H. Friedman for Appellant Cross-Appellee Perry Johnson in 96-2586, Leo H. Friedman for Appellant Cross-Appellee Perry Johnson in 96-2588. Certificate of service date 4/21/98 [96-2567, 96-2568, 96-2586, 96-2588] (ert) [96-2567 96-2568 96-2586 96-2588]
4/22/98	LETTER SENT by supv granting motion to extend time to file petition for rehearing [1715012-1] filed by Leo H. Friedman, Petition due 5/15/98 for Leo H. Friedman in 96-2567 [96-2567, 96-2568, 96-2586, 96-2588] (ert) [96-2567 96-2568 96-2586 96-2588]

* * *

5/14/98	PETITION for en banc rehearing filed by Leo H. Friedman for Appellant Cross-Appellee Perry M. Johnson . Certificate of service date 5/14/98. [96-2567, 96-2568, 96-2586, 96-2588] (blh) [96-2567 96-2568 96-2586 96-2588]
6/18/98	ORDER filed denying petition for en banc rehearing [1729966-1] filed by Leo H. Friedman [96-2567, 96-2568, 96-2586, 96-2588]. Cornelia G. Kennedy, Nathaniel R. Jones, Richard F. Suhrheinrich, Circuit Judges. (blh)

* * *

8/7/98	Appellant LETTER filed regarding Petition for Writ of Certiorari was filed in Supreme Court on 8/6/98. [96-2567, 96-2568, 96-2586, 96-2588, 97-1272] . Letter from Leo H. Friedman for Appellant Cross-Appellee Perry M. Johnson in 96-2567 . Certificate of service date 8/6/98 [96-2567, 96-2568, 96-2586, 96-2588, 97-1272] (ert) [96-2567 96-2568 96-2586 96-2588 97-1272]
8/24/98	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Cross-Appellee Perry M. Johnson in 96-2567, Appellant Cross-Appellee Perry M. Johnson in 96-2568, Appellant Cross-Appellee Perry Johnson in 96-2586, Appellant Cross-Appellee Perry Johnson in 96-2588, Appellant Perry Johnson in 97-1272 . Filed in the Supreme Court on 08-11-98 , Supreme Ct. case number: 98-262 . [96-2567, 96-2568, 96-2586, 96-2588, 97-1272] (swh) [96-2567 96-2568 96-2588 97-1272]
11/19/98	U.S. Supreme Court letter filed granting petition for writ of certiorari, limited to two questions, [1789040-1] filed by Perry M. Johnson, Perry M. Johnson, Perry Johnson, Perry Johnson, Perry Johnson [96-2567] . Filed in the Supreme Court on 11-16-98 . (swh) [96-2567]

GENERAL DOCKET FOR Sixth Circuit Court of Appeals

Court of Appeals Docket #: 96-2568
Nsuit: 3550 Prisoner: Civil Rights
Hadix v. Johnson
Appeal from: Eastern District of Michigan at Detroit

EVERETT HADIX; et al (96-2567) Plaintiffs -
v.
PERRY M. JOHNSON; et al (96-2568) Defendants -
Appellants/Cross-Appellees.

12/30/96 Prisoner Case Docketed . Notice filed by Appellee Cross-Appellant Everett Hadix. Transcript needed: n (PRLA's limits on attorney fees apply to this case for work performed after the PLRA's enactment). (ert) [96-2568]

[Thereafter all relevant proceedings and docket entries are the same as in consolidated case docket No. 96-2567.

GENERAL DOCKET FOR Sixth Circuit Court of Appeals

Court of Appeals Docket #: 96-1851
Nsuit: 3550 Prisoner: Civil Rights
Hadix v. Johnson
Appeal from: Eastern District of Michigan at Detroit

Case type information:
1) prisoner petition
2) state
3) prisoner civil rights

Lower court information:

District: 0645-2 : 80-73581
Court Reporter: Lynn Spietz
Trial Judge: John Feikens
Court Reporter: Elnora Williams
Date Filed: 9/18/80
Date order/judgment: 6/4/96
Date NOA filed: 6/13/96

Fee status: paid

Prior cases:
None
Current cases:

	Lead	Member	Start	End
Consolidated:				
	96- 1907	96- 1908	6/16/98	
	96- 1907	96- 1943	6/16/98	
Related:				
	96- 1851	96- 1907	9/30/96	
	96- 1851	96- 1908	9/30/96	
	96- 1851	96- 1943	9/30/96	

EVERETT HADIX,Plaintiff - Appellee
v.

PERRY JOHNSON, Defendant - Appellant FTS 335-7157
***

5/20/98	OPINION filed:Orders holding the pre-1997 automatic stay provision unconstitutional are REVERSED; the 5/30/96 award of attorney fees entered in the Hadix litigation by Judge Feikens and Judge Enslen's decision to retain jurisdiction over the security classification system at the MI Reformatory are AFFIRMED; the case is REMANDED for further proceedings. [96-1851, 96-1907, 96-1908, 96-1943], decision for publication pursuant to local rule 24 [96-1851, 96-1907, 96-1908, 96-1943] Circuit Judges Boyce F. Martin Jr., Chief Judge; Alan E. Norris, sep con/dis; Karen N. Moore, Authoring. (ert)
5/20/98	JUDGMENT: REVERSED in part; AFFIRMED in part and remanded for further proceedings consistent with the opinion. (ert)
6/11/98	MANDATE ISSUED with no cost taxed [96-1851] (eim)

Docket as of September 17, 1998 9:32 pm

MARY GLOVER, et al,

Plaintiffs

v

PERRY JOHNSON, et al,

Defendants

_____/

THE DISTRICT COURT OF THE
EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION
NO. 77-71229

SELECTED DOCKET ENTRIES

May 19, 1977	1	Complaint filed, Summons issued.
Oct 3, 1977	19	Pltf's Amended Complaint with proof of service. DD 10-4-77
Oct 10, 1979	104	Opinion that an Order will be issued granting Pltfs declaratory and injunctive relief in accordance with the terms of this opinion. DD 10-19-79 Feikens J
Apr 6, 1981	153	Final order, re: that the rehabilitation opportunities available to the state's women prisoners were substantially inferior to those available to the state's male prisoners, ect. (see order) DD 4-10-81 Feikens J
Feb 3, 1982	164	OPINION Granting Award of Attorney Fees, Feikens, J. dd 2/4/82
May 10, 1985	201	STIP. and Order regarding attorney fees. Feikens, J. cdo

Jul 2, 1985	206	APPEARANCE of attorneys Deborah LaBelle for pltfs., w/proof of service. cdo
Nov 7, 1985	216	ORDER granting pltfs' motion for system for submission of attorney fees, requests for fees shall be submitted to opposing counsel every six months, defts will have 28 days to contest the amount.
Jul 30, 1987	386	MEMORANDUM opinion and order that Charlene Snow recover from defts and hourly rate of $115.00 for 235.17 hours ($277,044.55) and and $942.38 in costs for a total of $27,986.93. Deborah LaBelle recover from defts $115.00 per hr for $210.82 hours ($24,244.30) and $1,535.04 in costs for a total of $25,779.34. FEIKENS J
11/27/89	541	MEMORANDUM opinion and order by Judge John Feikens granting motion by Charlene M. Snow for attorney fees [503-1], granting Deborah LaBelle's attorney fees, and granting plaintiffs' counsel their combined costs for January through June of 1989, with proof of mailing (SB) [Entry date 11/28/89]
12/11/89	543	APPEAL by defendants of order [541-1] to USCA - FEE: PAID - Receipt #: 248610 (1B) [Entry date 12/13/89]
5/22/90	581	MEMORANDUM opinion and order by Judge John Feikens granting motion for attorney (settlement) fees by Mary Glover [523-1] and granting motion for costs by Mary Glover. And that plaintiffs motion regarding fees for worked performed on behalf of Fair and

		Alcorta is granted with proof of mailing. See order for details. [523-2] (1h) [Entry date 05/24/90]
12/17/92	766	OPINION and order by Judge John Feikens granting in part and denying in part motion by Deborah A. LaBelle and Martin A. Geer for settlement of attorney fees and costs by plaintiff [756-1] (1179)
8/4/94	946	NOTICE by plaintiffs of substitution of attorney Michael J. Barnhart for plaintiffs Mary Glover, Lynda Gates, Jimmie Ann Brown, Mannette Gant, for Jacalyn M Settles for attorney Martin Geer with appearance and proof of mailing (1087) [Entry date 08/10/94]
3/11/96	1108	MOTION by plaintiffs for settlement of attorney fees and costs for the time period of 7/1/95 through 12/31/95 with brief, exhibits, proof of mailing, notice of hearing, and proposed order (1092) [Entry date 03/12/96]
5/30/96	1164	OPINION and order by Judge John Feikens regarding attorney fees for the period of 7/1/95 thru 12/31/95 (see order for details) (1054) [Entry date 06/03/96]
6/13/96	1173	APPEAL by defendants of order 1164-1] to USCA - FEE: PAID - Receipt #: 329487 (1044) [Entry Date 06/24/96]
12/4/1996	1219	MEMORANDUM opinion and order by Judge John Feikens granting motion for settlement of attorney fees and costs for the time period of 1/1/96 through 6/30/96 by Mary Glover, Lynda Gates, Jimmie Ann Brown, Mannette

		Gant, Jacalyn M. Settles [1209-1] with proof of mailing (lt) [Entry date 12/5/96]
12/17/96	1222	APPEAL by defendants of order [1219-1) to USCA - FEE: paid - Receipt #: 337348 (pr) [Entry date 12/23/96]
12/24/96	1228	CROSS-APPEAL by plaintiffs of order [1219-1] to USCA FEE: paid Receipt #: 337570 (pr) [Entry date 12/30/98]
2/6/97	1242	OPINION and order by Judge John Feikens DENYING motion for reconsideration and clarification of opinion order dated 12/4/96 regarding fees [1219-1] by Lynda Gates, Jimmie Ann Brown, Mannette Gant, Jacalyn M. Settles, Mary Glover [1231-1], DENYING motion for evidentiary hearing by Lynda Gates, Jimmie Ann Brown, Mannette Gant, Jacalyn M. Settles, Mary Glover [1231-2] with proof of mailing (bk) [Entry date 02/07/97]
2/6/97	1244	OPINION and order by Judge John Feikens GRANTING motion for settlement of post-judgment appellate fees and costs by Mary Glover, Lynda Gates, Mannette Gant, Jimmie Ann Brown, Jacalyn M. Settles [1218-1] with proof of mailing (bk) [Entry date 02/07/97]

GENERAL DOCKET FOR Sixth Circuit Court of Appeals

Court of Appeals Docket #: 96-2586
Glover v. Johnson
Appeal from: Eastern District of Michigan at Detroit

- -

MARY GLOVER; et al (96-2588) Plaintiffs - Appellees/Cross-Appellants
v.
PERRY JOHNSON; et al (96-2586) Defendants - Appellants/Cross-Appellees

12/31/96	Prisoner Case Docketed . Notice filed by Appellant Cross-Appellee Perry Johnson. Transcript needed: y (ert) [96-2586]

[Thereafter all relevant proceedings and docket entries are the same as in consolidated case docket No. 96-2567.]

GENERAL DOCKET FOR Sixth Circuit Court of Appeals

Court of Appeals Docket #: 96-2588
Glover v. Johnson
Appeal from: Eastern District of Michigan at Detroit

- -

MARY GLOVER; et al (96-2588) Plaintiffs - Appellees/Cross-Appellants

v

PERRY JOHNSON; et al (96-2586) Defendants - Appellants/Cross-Appellees

12/31/96	Prisoner Case Docketed . Notice filed by Appellee Cross-Appellant Mary Glover. Transcript needed: y (ert) [96-2588]

[Thereafter all relevant proceedings and docket entries are the same as in consolidated case docket No. 96-2567.]

GENERAL DOCKET FOR Sixth Circuit Court of Appeals

Court of Appeals Docket #: 96-1852
Glover v. Johnson
Appeal from: Eastern District of Michigan at Detroit

- -

MARY GLOVER; et al Plaintiffs - Appellees
v.
PERRY JOHNSON, Director; et al, Defendants - Appellants

6/28/96	Prisoner Case Docketed. Notice filed by Appellant Perry Johnson; et al, Transcript needed: n (attorney fees) (ert) [96-1852]
• • •	
3/13/97	CAUSE ARGUED on 3/13/97 by Lisa C. Ward for Appellant Perry Johnson in 96-1852, Deborah A. LaBelle for Appellee Mary Glover in 96-1852 before Judges Wellford, Ryan, Daughtrey. [96-1852] (paw) [96-1852]
• • •	
3/2/98	OPINION filed: dc judgment denying motion to terminate continuing district court jurisdiction (95-1521) is VACATED and the case is REMANDED for further proceedings with jurisdiction retained[95-1521]; dc judgment finding the defts in contempt of court and imposing sanctions (96-1931) and the dc judgment awarding attorney fees (96-1852 and 96-1948) is AFFIRMED in part REVERSED in part and remanded [95-1521, 96-1852, 96-1931, 96-1948], decision for publication pursuant to local rule 24 [95-1521, 96-1852, 96-1931, 96-1948]. Harry W. Wellford,Circuit Judge,separate con/dis.; James L. Ryan, Circuit Judge-AUTHORING; Martha C. Daughtrey, Circuit Judge. (ert) [96-1852 96-1931 96-1948]

3/2/98 JUDGMENT:dc judgment in VACATED and the case is REMANDED with jurisdiction retained (95-1521); AFFIRMED in part REVERSED in part and remanded for further proceedings (96-1852, 96-1931, 96-1948) . (ert) [96-1852 96-1931 96-1948]

3/10/98 CERTIFIED RECORD RETURNED for use by district court Volumes included: 9 Pl; 6 Tr; 1 Dep;. To be returned to 6CA by 4/13/98 in 95-1521, in 96-1852, in 96-1931, in 96-1948 . [95-1521, 96-1852, 96-1931, 96-1948] (rgf) [95-1521 96-1852 96-1931 96-1948]

3/24/98 MANDATE ISSUED with no cost taxed [96-1852, 96-1948] (eim) [96-1852 96-1948]

6/26/98 CERTIFIED RECORD RETURNED to lower court at the end of appellate proceedings. [96-1852] . Volumes included: 9 Pl; 6 Tr; 1 Dep;. (rgf) [96-1852]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, et al.,

Plaintiffs,

vs. No. 80-CV-73581-DT

PERRY JOHNSON, et al., HONORABLE JOHN FEIKENS
MAGISTRATE STEVEN D. PEPE

Defendants.
_____/

MAGISTRATE'S SPECIAL MASTER REPORT AND RECOMMENDATION

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APPENDIX A

Summary and Exhibits Submitted
in the Special Master Hearings on
Fee Petitions of Plaintiffs' Attorneys

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, *et al.*,

Plaintiffs,

vs.

No. 80-CV-73581-DT
HONORABLE JOHN FEIKENS
MAGISTRATE STEVEN D. PEPE

PERRY JOHNSON, *et al.*,

Defendants.
_____/

MAGISTRATE'S SPECIAL MASTER

REPORT AND RECOMMENDATION

Plaintiffs brought a class action challenge to the conditions of confinement of the inmates incarcerated at Central Complex of the State Prison at Southern Michigan (SPSM-CC), including the Reception and Guidance Center. This suit was initiated September 18, 1980. At the final pretrial conference on January 28, 1983, defendants indicated they would not contest liability and were willing to negotiate terms of an appropriate remedy. A Consent Judgment was entered on May 13, 1985, resolving many of the areas involved in the plaintiffs' First Amended Complaint.

Plaintiffs' counsel have petitioned the Court for attorney's fees and Costs under 42 U.S.C. § 1988. Plaintiffs asserted their right to such fees and Costs in the prayer for relief of their First Amended Complaint. The petitions involve extensive itemizations of billable hours for five attorneys as well as Prison Legal Services. Defense counsel filed objections challenging first whether the plaintiffs had waived attorney's fees in the consent decree, thus precluding an award, or in the alternative whether they were prevailing parties within the meaning of 42 U.S.C. § 1988. This Court, by Memorandum Opinion and Order of February 6, 1986, ruled against the defendants on these two issues.

By Order of Reference dated February 18, 1986, this matter was referred to the undersigned for a Special Master's report on appropriate attorney's fees and costs, including: (1) hundreds of hours challenged as being inadequately described or documented; (2) hours for attorney services for plaintiffs that were allegedly duplicative, excessive in time or dealt with unresolved or unsuccessful issues; (3) the appropriate hourly rates for each of the five petitioners; and finally (4) whether the rates should be adjusted by some multiplier. The Order of Reference specifically noted that the Special Master's report need not be accompanied by a transcript of the proceedings. In lieu thereof, the undersigned has prepared a detailed appendix summarizing the testimony taken with regard to this fee petition. It is hoped that the extensive summary of the testimony may serve as the factual background for consideration of the findings and recommendations and will preclude the necessity of either side having to have transcribed the extensive hearings in this matter either for review by the district court judge or the appellate court. This effort does not preclude either side from obtaining a transcript to challenge either the summary of the evidence or the ultimate findings and recommendation.

While the Court has made an initial determination that the plaintiff's have succeeded on significant issues in litigation in order to qualify as prevailing parties, the issue of the degree of success, as noted in the summary of the law that follows, must be considered again both with respect to which of those itemized hours were to be included in the attorney's fees calculation, as well as whether there should be an adjustment of the attorney's fees upward or downward due to the degree of success. As noted below, a limited stipulation has been agreed to by counsel dealing with hours inadequately described, duplication of effort among plaintiffs' counsel, work performed on unsuccessful and unresolved issues, and work for which there were no contemporaneous time records.

The defendants' challenge to the fee request argued that the limited degree of success should defeat both plaintiffs' being considered prevailing parties as well as any claim for an enhancement of the fee award. Defense counsel in the pleadings did not specifically argue that other than by the

exclusion of certain hours, this Court should diminish the fees awarded due to the alleged limited degree of success achieved. It became clear during the presentations of the evidence and arguments during the hearings undertaken in this matter, that defense counsel sought to argue that the alleged limited degree of success should not only defeat prevailing party status or any enhancement that the plaintiffs asserted, but it should also be considered to diminish any fee award beyond the mere exclusion of certain hours spent on unsuccessful or unresolved issues. Since it is ultimately for the Court to determine what is a reasonable fee under 42 U.S.C. § 1988, any deficiencies in defense counsels' pleadings should not preclude their being able to argue this issue. For purposes of this report, the undersigned has considered the defendants' arguments that the limited degree of success should not only preclude enhancement but should result in a diminution of the attorney's fees awarded in addition to the mere exclusion of certain hours that plaintiffs' counsel spent on unsuccessful issues. Conceptually, hours spent on unsuccessful issues are different from hours spent on successful issues of little significance. In arriving at a reasonable fee, separate reductions might be appropriate for each of these considerations.

This report shall be organized into four sections: I. Summary Chronology of the *Hadix* Litigation; II. The Legal Standard for Fee Awards; III. Findings of Fact; and IV. Recommendations. Appendix A summarizes the evidence presented in the fee petition hearings; Appendix B is a Stipulation and Order Regarding Attorney Fees; and Appendix C. is a List of Exhibits.

I. SUMMARY CHRONOLOGY OF THE HADIX LITIGATION[1]

[Dates in this chronology are primarily from this Court's docket sheet.]

September 18, 1980--plaintiffs' *pro se* complaint is filed.

October 30, 1980	--	Magistrate Paul Komives contacts Larry Bennett and Zolton Ferency regarding their being involved as counsel for the plaintiffs. They are formally appointed December 6, 1980.
January 7, 1981	--	defendants file a motion to dismiss or in the alternative motion for summary judgment.
March 23, 1981	--	plaintiffs file a motion for class certification.
May 8, 1981	--	Thomas Loeb files his appearance as co-counsel for the plaintiffs.

[1] For purposes of brevity, the summary of the case presented here is solely a chronological sequence of events. Defendants have made a statement of facts in their January 2, 1986, Motion for Summary Judgment (pp. 3-9) on the fee petition. Petitioners in their January 8, 1986, Brief In Response to Defendants' Motion for Sumnary Judgment (pp. 3-17) prepared under the direction of lead counsel, Larry Bennett, have presented a somewhat more elaborate narrative of the history of this case. The summary of evidence in the Appendix is drawn from these submissions as well as the testimony of petitioner Bennett who testified on the history of the litigation. Defense counsel was asked to indicate which areas of the plaintiffs' Statement of Proceedings (pp. 3-17 noted above) on the history of the case the defendants agreed with and what areas of the submission they felt were mischaracterizations of facts.

On June 6, 1986, defense counsel submitted its statement of facts and a copy of the petitioners' Statement of Proceedings with certain portions deleted. Other than certain differing characterizations about various proceedings affecting this matter and characterizations concerning the process of negotiating the consent decree, there is substantial agreement upon the case history facts.

May 13, 1981	--	Judith Magid files her appearance as co-counsel for the plaintiffs.
June 23, 1981	--	the defendants' motion to dismiss is granted with respect to the Michigan Department of Corrections and Governor Milliken being dismissed as defendants. Certain paragraphs of the complaint are stricken, but otherwise the motion to dismiss and/or for summary judgment is denied.
August 24, 1981	--	plaintiffs' counsel requests permission to enter SPSM-CC for inspection.
August 24, 1981	--	the Court grants plaintiffs' motion to certify the case as a class action.
September 9, 1981	--	plaintiffs' file motion for order permitting entry into SPSM-CC for inspection and other purposes.
September 22, 1981	--	plaintiffs file interrogatories.
September 23, 1981	--	order grants entry into SPSM-CC for inspection and other purposes.
September 30, 1981	--	defendants answer plaintiffs' complaint.
October 2, 1981	--	defendants file their second motion to dismiss or in the alternative summary judgment.
October 2-3, 1981	--	plaintiffs' expert, Dr. David

October 2-3, 1981 -- plaintiffs' expert, Dr. David Fogel, tours SPSM-CC.

December 18, 1981 -- Brian MacKenzie replaces J. Peter Lark as defense counsel.

December 22, 1981 -- plaintiffs file a petition for a preliminary injunction to preserve the availability of Prison Legal Services.

December 24, 1981 -- defendants submit their first interrogatories to the plaintiffs.

January 15, 1982 -- the preliminary injunction is granted preserving Prison Legal Services.

February 3, 1982 -- defendants appeal the preliminary injunction order.

Extensive discovery is undertaken in 1982, including various discovery motions. Defendants' second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and eleventh sets of discovery documents were filed respectively on March 25, March 31, April 15, May 3, June 14, August 20, August 27, September 1, and September 29, 1982. Plaintiffs file their second set of interrogatories and a documents request on April 26, 1982. Prison tours are conducted for plaintiffs by Dr. Robert Powitz (sanitation); Dr. Brad Fisher (psychological care and classification); and Curtis Pulitzer (architectural design/management); and food service data is made available to plaintiffs' nutritionists, Paula and Michael Zemel. Defense experts touring the facility include Carl Clements and Paul Keve (correctional practices); Ted Gordon (sanitation); Dr. Lloyd Baccus (psychological care); Paul Silver (architecture and management); and Judy Wilson (nutrition).

June, 1982 -- the United States Department of Justice issues its report on the Michigan prison system (The Schoen Report).

August 24, 1982 -- order granting leave to file plaintiffs' first amended complaint. The complaint asserts violations of the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments of the United States Constitution, counterpart provisions of the Michigan Constitution, violations of Michigan state laws and regulations affecting the operations of prisons, as well as a third party complaint under 42 U.S.C. §3750(b), (the Law Enforcement Assistance Act.)

October 28, 1982 -- Elaine Fischhoff enters her appearance as co-counsel for the defendants.

October 29, 1982 -- Assistant Attorney General William Bradford Reynolds writes Governor William Milliken concerning the Michigan prison system.

December 14, 1982 -- Patricia A. Streeter, Deborah LaBelle, and Michael Barnhart enter their appearances as co-counsel for plaintiffs.

December 30, 1982 -- defendants' third motion to dismiss and in the alternative for summary judgment is filed.

January 7, 1983 -- Professor John Patrick Apol enters his appearance as co-counsel for the plaintiffs.

January 13, 1983 -- plaintiffs notice depositions of defendants Johnson and Foltz and plaintiffs' expert witnesses Fisher

plaintiffs' expert witnesses Fisher and Powitz.

January 28, 1983 -- final pre-trial and settlement conference at which the defendants' counsel, MacKenzie, requests an adjournment of trial and indicates a willingness to enter into a negotiated settlement.

February 10, 1983 -- Settlement Negotiation Order No. 1.

March 1, 1983 -- a February 25, 1983, letter from Bennett and Magid requesting an order that the Justice Department Report on Michigan Prisons be provided to plaintiffs' counsel.

April 26, 1983 -- plaintiffs' settlement proposal.

May 4, 1983 -- Settlement Negotiation Order No. 2

May 4, 1983 -- pursuant to a request by the plaintiffs the Department of Justice Report on Michigan Prisons is turned over to the plaintiffs.

July 11, 1983 -- negotiation summary filed.

July 13, 1983 -- pre-trial conference in court. (Representations by defense counsel that the pre-complaint negotiations in *U.S.A. v. Michigan*, Civ. G 84-63 CA (W.D.Mich.), a Justice Department CRIPA action under 42 U.S.C. §1977 (hereinafter "*U.S.A.*"), is on a separate track from the *Hadix* case.

July 14, 1983 -- Thomas Nelson enters his appearance as co-counsel for defendants.

July 18, 1983 -- Scheduling Order:
Phase I - (July 15 - September 15, 1983) settlement negotiations by counsel;
Phase II - (September 15 - October 11, 1983) settlement negotiations with counsel, experts, and the Court;
Phase III - (October 15 - November 15, 1983) discovery on unresolved issues;
Phase IV - trial by December 15, 1983.

July, August and September, 1983 -- negotiations continue

September 29, 1983 -- pre-trial conference with the Court and summary of negotiations.

September, October and November, 1983 -- negotiations continue.

October 20, 1983 -- a Phase II negotiation on prison size and management.

December 15, 1983 -- defense 40 page summary of negotiations.

January 18, 1984 -- *U.S.A. v. Michigan*, G 84-63 CA is filed in the Western District of Michigan and is assigned to Judge Richard A. Enslen.

January 23, 1984 -- order for Attorney General Frank J. Kelley and Department of Corrections Director Perry Johnson to appear at pre-trial conference to explain the relationship, if any, between the proposed consent decree in *U.S.A.* and the *Hadix* negotiations.

February 16, 1984 -- pre-trial conference with Attorney

February 16, 1984 -- pre-trial conference with Attorney General Kelley and Director Perry Johnson who state their intent to continue in good faith negotiations in *Hadix* separate from those in *U.S.A.*

March 1, 1984 -- pre-trial conference.

March 15, 1984 -- pretrial conference, defendants' proposal for a physical layout of SPSM-CC is rejected by the plaintiffs as not addressing the administrative problems nor most of the serious physical problems. This matter is set for Phase IV-- trial.

March 19, 1984 -- defendants' twelfth discovery request.

March 23, 1984 -- arguments before Judge Enslen on *U.S.A.* consent decree and motion of *Hadix* plaintiffs to intervene in *U.S.A.* Judge Enslen requires the *U.S.A.* decree to be redrafted to improve its enforceability.

March 30, 1984 -- plaintiffs' third interrogatories and second request for production of documents.

April 2, 1984 -- defendants' thirteenth discovery request and deposition notices for plaintiffs' experts.

April 10, 1984 -- defendants' Offer of Judgment, including an offer to perform a management study.

May 16, 1984 -- plaintiffs' response to Offer of Judgment and counter offer, including the requirement that the

including the requirement that the results of any management study be implemented.

June 8, 1984 -- a meeting regarding management, fire safety, access, and ventilation. Negotiations on plaintiffs' input on management study, staff composition and implementation.

June 14, 1984 -- status report with the Court [from Bennett time sheet]

June 22, 1984 -- Streeter and Magid appear before Judge Richard Enslen regarding acceptance of the amended *U.S.A.* Consent Judgment. Streeter tells Judge Enslen that they had met with defense counsel and Judge Feikens in the last week and had settled *Hadix* in concept, and the defendant State of Michigan was to submit the proposed Consent Judgment. (*U.S.A.* hearing transcript, June 21, 1984, p. 3, 1.21 to p. 4, W.4)

July 17, 1984 -- draft agreement.

July 23, 1984 -- pre-trial status conference with the Court outlining the areas of agreement and unresolved issues and highlighting the differences between *Hadix* and *U.S.A.* Issues with respect to the physical plant and management of the Central Complex of SPSM are resolved. Defendants assert that they prevailed upon the visitation claims of the plaintiffs. Left unresolved are the issues of access to the courts, classification of

prisoners, and the due process issues on prisoners' disciplinary and administrative segregation.

August 8, 1984 -- meeting with the Court on issues of access, due process, and classification which are to be tried.

September 19, 1984 -- notice to the members of the class regarding objections to the proposed consent decree to be filed by November 15, 1984. (Hearings on the consent decree are scheduled for December 13, 1984, and later rescheduled to January, then February 1985.

February 13, 1985 -- a class action hearing pursuant to Fed.R.Civ.P. 23(e) regarding the acceptance of the consent decree.

April 4, 1985 -- court opinion approving the consent decree.

May 13, 1985 -- order accepting the Consent Judgment.

II. THE LEGAL STANDARD FOR FEE AWARDS:

a. The Attorney's Fees

In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983), the Supreme Court noted that attorney's fees under 42 U.S.C. §1988 should be awarded to plaintiffs' counsel who achieved limited success only for those parts of the case in which plaintiffs prevailed. The *Hensley* opinion set out a two step approach to consider "reasonable" attorney's fees. It begins with the "lodestar", the hours spent on a case multiplied by a reasonable hourly rate of compensation for each attorney involved. This approach was developed in *Lindy Bros., Inc. v. American Radiator and Standard Sanitary Corp.*, 487 F.2d 161, 167 (3rd Cir. 1973), (Lindy I). The

Corp., 487 F.2d 161, 167 (3rd Cir. 1973), (Lindy I). The Supreme Court noted that the lodestar calculation "provides an objective basis on which to make an initial estimate of the value of a lawyer's services." 461 U.S. at 433, 103 S.Ct. at 1939. The Supreme Court, however, added:

> The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward....

461 U.S. at 434, 103 S.Ct. 15 1940. The Court then noted that the district court could consider other factors that had been identified by the Fifth Circuit in *Johnson v. Georgia Highway Express,Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). Johnson set out a twelve factor approach that included not only time and customary fees, but also the novelty and difficulty of the question, the preclusion of other employment, whether the fee is fixed or contingent, the time limitations imposed by the client or circumstances, the amount involved, the results obtained, the undesirability of the case, and awards in similar cases.

In *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541 (1984), the Supreme Court upheld payments ranging from $95[2] to $105 per hour to three Legal Aid Society attorneys. The Court held that a reasonable fee under §1988 is to be calculated according to prevailing market rates and not the actual costs of the services provided. *See also Northcross v. The Board of Education of Memphis City Schools*, 611 F.2d 624, (6th Cir. 1979), *cert. denied* 447 U.S. 911 (1980). Market rate legal fees should be awarded even where plaintiffs were represented by publicly paid Legal Services attorneys. *Blum* added that the

[2] Footnote 4 of *Blum* notes that Ann Monnihan, with one and a half years of practice experience, was paid at $95 an hour; Paula Gallowitz, who had clerked for a state judge after graduation and had an additional one and a half years of practice experience, was paid at $100 per hour; and Arthur Fried, who clerked for a United States District Court judge and had one and a half years of practice experience, was paid at $105 per hour. This fee award was made pursuant to an application of November 1980 for work in a lawsuit that had commenced in 1978.

Civil Rights Attorneys Fees Award Act in §1988 directed that fees be governed "by the same standard which prevailed in other types of equally complex Federal litigation, such an anti-trust cases" and that they not be reduced because the rights involved are not measurable in a pecuniary fashion.

Justice Powell in a unanimous opinion in Blum noted that the lodestar figure was not a mere "rough guess" or initial approximation of a final award. He added:

> When... the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee.

465 U.S. at 897, 104 S.Ct. at 1548. *Blum* refined *Hensley* in limiting the factors that the district court could consider in making an adjustment to the lodestar amount. It reiterated the *Hensley* comment that many of the *Johnson* factors "are subsumed within the initial calculation" of the lodestar. The lower court in *Blum* had enhanced the amounts awarded by 50% because of the quality of representation, the complexity of the issues, the riskiness of success, and the great benefit it conferred on the large class of medicaid recipients. The Supreme Court in *Blum* reversed the lower court on this 50% enhancement of the lodestar. It noted that the District Court and the Court of Appeals did not adequately articulate reasons justifying the enhancement.[3] It found the District Court's explanations did not withstand examination since the novelty of the issues was presumably reflected in the number of billable hours, and the special skill and experience of the attorneys were reflected in their hourly rates. The special quality of representation also "generally is reflected in the reasonable hourly rate". 104 S.Ct. at 1549.

> In view of our recognition that an enhanced fee may be justified "in some cases of exceptional success," we cannot agree with the petitioner's argument that an "upward adjustment" is never permissible. The statute requires a "reasonable fee," and there may be

[3] *See also* the post-*Blum* case of *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, at 923-24 (6th Cir. 1984).

> circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high. [The Court then notes here that the lodestar is presumed to be a reasonable fee under §1988.]
>
> * * * *
>
> . . .The burden of proving that such an adjustment is necessary to the determination of a reasonable fee is on the fee applicant.

104 S.Ct. at 1548. The Supreme Court stated that the district court had, without elaboration, accepted plaintiff's counsel's conclusory assertions for the upward adjustment, referring to the complexity of the litigation, the novelty of the issue, the high quality of representation, the "great benefit" to the class, and the "riskiness of the lawsuit."

> Because acknowledgment of the "results obtained" generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award.

104 S.Ct. at 7549. In a footnote, the Supreme Court noted that the number of persons benefited also was not a significant consideration under §1988. *Id.* n. lb. It then stated that the district court had failed to show any evidence in the record as to why the benefit achieved required an upward adjustment. It held the record demonstrated that the fee schedule of $95 to $105 per hour was reasonable but that there was not sufficient evidence to justify the enhancement sought by plaintiffs counsel. Thus, plaintiffs failed to carry their burden of justifying an entitlement to an upward adjustment.

After *Blum*, novelty and complexity of the issue, special skill and experience of counsel, quality of representation, and results obtained from the litigation are presumed to be reflected adequately in the lodestar amount and without some special showing they cannot serve as an independent base for increasing the basic fee award. *Blum* left unresolved the issue

of whether risk of loss could ever justify an upward fee adjustment. 104 S.Ct. at 1550, n 17.

The evidentiary hearings on attorney's fees in the present case were undertaken in light of *Hensley, Blum, Northcross,* and *Davis*. Counsel provided evidence on reasonable hourly rates and the number of reasonable hours incurred to establish the lodestar. Fee petitioners further submitted evidence, which plaintiffs' attorneys in *Blum* apparently had failed to do, to justify an enhancement. Petitioners assert that the lodestar, which is presumed to be a reasonable fee under *Blum*, is not adequate compensation in the present case. Defense counsel offered several depositions, affidavits, and cross-examination to oppose any enhancement. Plaintiffs' counsel submitted evidence on: (1) the quality of service rendered; (2) delay in payment; (3) the riskiness of the case, involving the novelty and uncertainty of its successful conclusion; and (4) the exceptional results that were achieved in the *Hadix* consent decree.

Subsequent to the extensive hearings and testimony taken on these issues in this case, the Supreme Court on July 2, 1986, decided *Pennsylvania v. Delaware Valley Citizens Council For Clean Air*, 106 S.Ct. 3088 (1986). In that case, six justices joined in an opinion that seems to raise even higher the presumed reasonableness of the *Lindy* lodestar. The majority discounts the *Johnson* twelve factors approach as providing little guidance for the lower courts. The majority expresses concern that *Johnson* permits too many subjective factors to limit the discretion of trial judges and avoid disparate results.

In *Delaware Valley*, the lower court had granted fee awards of between $25 and $100 an hour depending upon the phases of litigation and the level of complexity of the legal tasks involved. For several of the phases, the district court granted a multiplier.[4] On one of those phases, the multiplier

[4] *Delaware Valley* was commenced in 1977 and a consent decree was entered in 1978 which involved continued litigation through 1984, with the majority of the work being done in 1981 and 1982. Two "associate level" attorneys who were admitted to practice in 1977 and 1978 and who had no prior litigation experience were granted fees of $65/hour. 726 F.2d 272, at 279 (3rd Cir. 1985). While the fee award challenge was decided in 1984 [581 F. Supp. 1412 (E.D. Pa. 1984)], the court did not use either a current fee rate or an historic rate. Instead, it used an "average rate" over the five years of litigation covered in the fee petition [762 F.2d at 278 n. 8].

was a factor of two, doubling the lodestar because of the "high quality of the representation provided in that phase." 106 S.Ct. at 3093. On three phases, it granted a multiplier of two, doubling the lodestar amount "to reflect the low likelihood of success" plaintiffs faced in that stage of litigation. Again, as in Blum, the Supreme Court did not question the hourly rates that were set in computing the lodestar but reversed the lower court on granting the enhancement for the superior quality of representation. It set for reargument next term the issue of whether risk of loss can be used to enhance a fee award.

The six justice majority in *Delaware Valley* continued to espouse at least the possibility of "upward adjustments of the lodestar figure" but reiterated in strong terms the limiting language of *Blum* and added "such modifications are proper only in certain 'rare' and 'exceptional' cases supported by both 'specific evidence' on the record and detailed findings by the lower court." 106 S.Ct. 3098.

In considering the asserted superior quality performance of plaintiff's counsel, the Court noted:

> [W]hen an attorney first accepts a case and agrees to represent a client, he obliges himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interest. Calculating the fee award in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rate, thus adequately compensates the attorney, and leaves very little room for enhancing the award on his post engagement performance. In short, the lodestar figure includes most, if not all, of the relevant factors comprising a "reasonable" fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.

Id. at 3098-3099. Noting that the quality of counsel is "adequately" reflected in the reasonable hourly rate, the

overall quality of performance ordinarily should not be used to adjust the lodestar, thus removing any danger of "double counting.[5] The Court concluded that the District Court and the Court of Appeals failed to make detailed findings as to why the lodestar amount was unreasonable and why the quality of representation of the individual attorneys was not adequately reflected in their hourly rate times the reasonable number of hours that they invested in the case.

"Degree of success" is looked at first to determine sufficient success to qualify as a "prevailing party".

To be a "prevailing party", plaintiffs need demonstrate success "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Id.* In determining that plaintiffs were the prevailing parties, this Court has already determined that plaintiffs have achieved success on a number of significant issues in the case that plaintiffs sought, and further determined that such success in significant ways exceeds the results achieved in *United States v. Michigan*, G 84-63, CA (W.D.Mich.), both in content and in opportunities for enforcement. Once the statutory threshold question that plaintiff's are "prevailing parties under §1988 has been determined", the district court must determine what fee is reasonable". *Hensley*, 103 S.Ct. at 1939. In determining a reasonable fee", the degree of success, however, must be looked at, a second time, often with closer scrutiny, to determine: (1) the reasonableness of the hours expended in arriving at the lodestar; and (2) whether an upward or downward adjustment should be made to the lodestar.[6]

Where plaintiff, as prevailing party, obtains only partial success this may affect the hours permitted in a fee request

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5 The majority then questioned the asserted "superior quality" of the plaintiff's counsel by noting that the lower court had discounted a 620 hour request to 324 hours because "a large number of the hours. . .were unnecessary, unreasonable or unproductive". *Id.*

6 "The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained'." *Hensley*, 103 S.Ct. at 1940.

and/or an adjustment of the lodestar. The *Hensley* opinion distinguished between two types of claims upon which a plaintiff does not succeed: (1) those which are related to the claim upon which the plaintiff prevailed; and (2) those which are unrelated -- based on different facts and different legal theories. Hensley noted that often plaintiffs assert alternate legal claims and theories involving a common core of facts and seek similar or alternate remedies related to those facts. If plaintiff ultimately achieves an excellent result on one of the legal theories, normally attorney's fees should be given for "all hours reasonably expended on the litigation." 103 S.Ct. at 1940.

> In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.... Litigants in good faith may raise ultimate legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

103 S.Ct. at 1940.

If the result is not excellent, but only partial or limited, then the fee award can be reduced either: (1) by identifying specific hours that should be eliminated; or (2) by some precentage reduction of the award to account for the limited success. 103 S.Ct. at 1941. Fees can be awarded under §1988 even when relief is granted, not on the asserted federal statutory and constitutional claims but on the alternate, pendent state claims. *Smith v. Robinson*, 104 S.Ct. 3457 (1984).

The Sixth Circuit in *Seaway Drive-In, Inc. v. Twp. of Clay*, 791 F.2d 447 (6th Cir. May 19, 1986), has recently shown how far courts have gone to permit §1988 fee recoveries where relief is not obtained on federal law. *Seaway* held that where a court grants relief on a pendent state claim, §1988 attorney fees can be awarded for work on constitutional claims never reached by the court if they were sufficiently substantial to support jurisdiction over the prevailing pendent state claim on which the party prevailed. The standard that *Seaway* uses is the

mandatory test of *United Mine Workers v. Gibbs*, 283 U.S. 715 (1966), *i.e.* the pleadings alleged a substantial federal claim that shares a common nucleus of operative fact" with the state claim upon which relief was ultimately granted. Of significance to the expansive court interpretation of §1988 fee eligibility, *Seaway* makes it clear that such fees can be awarded where relief was provided on state law grounds even if the substantial federal claim would later have been dismissed on a motion for summary judgment for lack of sufficient supporting evidence, and if the court had reached this dismissal point on the federal claim, it would have exercised its *discretionary* power not to retain jurisdiction over the pendent state claim after dismissal of the federal claim. Seaway noted, "The 'substantiality test'. . . does not contemplate . . . an inquiry into the proof behind the pleading." 791 F.2d at 452. Quoting *Smith v. Robinson*, 104 S.Ct. at 3467,[7] the court stated:

> [Section 1988] simply authorizes a district court to assume that the plaintiff has prevailed on his fee-generating claim and to award fees appropriate to that success.

Seaway, 791 F.2d at 454.

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[7] In *Smith* the Supreme Court found that the federal due process claim (on hearing *procedures* before denial of benefits) was unrelated to the successful state claim (providing *substantive* rights to educational benefits). In *Seaway*, ultimate success was also achieved on a pendent state claim. The Sixth Circuit, however, found there was:

> a single request for relief based on alternative legal theories -- a state law theory and a constitutional law theory. The District Court's jurisdiction over the state law claims was based, in part, on the fact that they and the constitutional law claims arose out of a common nucleus of operative fact. Thus, ... there is a sufficient relationship between the two claims to permit an award of attorney's fees on the constitutional claims.
>
> ...Hensley makes clear that the purpose of the "relationship between the claims" element of the fees award test is to prevent the award of fees in those cases where the fee and non-fee claims are aimed at achieving different results or where they are based on different facts and different legal theories.

Seaway, 791 F.2d at 455.

Seaway quotes the *Hensley* language about the difficulty of dividing "the hours expended on a claim-by-claim basis" where claims involve a common core of facts about which plaintiff asserts alternate legal theories: "Much of counsel's time will be devoted generally to the litigation as a whole." *Seaway*, 791 F.2d at 455, quoting *Hensley*, 461 U.S. at 435. In determining attorney's fees for a prevailing party:

> [T]he district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Id.

b. Attorney's Fees for Time Spent Pursuing a § 1988 Fee Award

The Sixth Circuit is in agreement with the other circuits that § 1988 fees are to be awarded for the preparation and any litigation needed to pursue a fee application. *Northcross v. Board of Education*, 611 F.2d 624, 637 (6th Cir. 1979), *cert. denied* 447 U.S. 911 (1980); *Weisenberger v. Huecker*, 593 F.2d 49, 53-54 (6th Cir.) *cert. denied* 444 U.S. 880 (1979).

c. Attorney's Fees for Hiring of Legal Counsel to Pursue Petitioners' Fee Claim

Courts have allowed petitioners for civil rights attorney's fees to obtain compensation for hiring a second firm to pursue a fee claim *See e.g. Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 958 (1st Cir. 1984); *Shadis v. Beal*, 703 F.2d 71, 73 (3rd Cir. 1983). Compensation has not been allowed for the time expended by the second firm prosecuting its own fee petitions or for time spent by the attorney becoming familiar with the case or obtaining information from the petitioner attorney regarding the case. *Grendel's Den*, 749 F.2d at 958.

d. Fees, Costs and Expenses

Northcross v. Board of Education, supra, at 939, states that certain costs and expenses can be awarded under 42 U.S.C.

§ 1988 and others are appropriate under 28 U.S.C. § 1920. It notes that § 1988 authorizes an award of incidential and necessary expenses incurred in furnishing effective and competent representation", which it interprets as

> . . . . reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client in the course of providing legal services. Reasonable photocopying, paralegal expenses, and travel and telephone costs are thus recoverable pursuant to statutory authority of § 1988.
>
> Other costs are on a different footing. These include costs incurred by a party to be paid to a third party, not the -attorney for the case, which cannot reasonably be considered to be attorney's fees. *See Wheeler v Durham Bd. of Educ.*, 585 F.2d 618 (4th Cir. 1978).
>
> These include, among others, docket fees, investigation expenses, deposition expenses, witnesses' expenses, and the costs of charts and maps. Most of these expenses have long been recoverable, in the court's discretion as costs, pursuant to 28 U.S.C. § 1920 . . . .

611 F.2d at 639.

Generally, fees paid for expert witnesses are not recoverable costs or recoverable under § 1920 only at the statutory witness fee rate. *See, e.g.*, 10 Wright, *Federal Practice and Procedure* § 2678, n. 17, (1982) and cases cited therein. Yet courts have widely ignored this general rule in cases brought under one of the civil rights acts. The remedial purposes of these statutes can be effectuated only if the attorneys who agree to represent civil rights plaintiffs are assured from the outset that *all* expenses reasonably incurred in the course of successful litigation will be reimbursed. In *Copeland v. Marshall*, 641 F.2d 880, 890 (D.C. Cir., 1980) (*en banc*), the court noted:

> Any fee-setting formula must produce an award sufficient to fulfill the primary purpose of awarding fees in Title VII cases, namely, "to encourage individuals injured by discrimination to seek judicial relief." *Piggie Park*, 390 U.S. at 402, 88 S.Ct. at 966. An award of fees provides an incentive to competent lawyers to undertake Title VII work only if the award adequately compensates attorneys for the amount of work performed.

See also, Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) (*en banc*) (quoting S.Rep. 94-1011, 94th Cong. 2d Sess.2: "If private citizens are to be able to assert their civil rights then citizens must have the opportunity to recover what it costs them to vindicate those rights in court."), and cases cited therein.

To effectuate the purposes of 42 U.S.C. § 1983, courts must have the power to order reimbursement to a prevailing plaintiff all reasonable and necessary expenses incurred in pursuing successful claims. Courts have often

> awarded the full fees of experts on the ground that their testimony and assistance were necessary or helpful in representing clients in civil rights litigation. . . . Counsel must have the assistance of experts to furnish effective and competent representation. In most civil rights litigation, *and in prison cases in particular, expert testimony is a vital ingredient in the proper presentation and decision of a case. Without the ability to recover experts' fees, plaintiffs, particularly prison inmates who are almost always indigent, will be unable to bring these cases.*

Jones v. Diamond, supra, at 1382. (Emphasis added.) *See also, Keyes v. School District No. 1*, 439 F. Supp. 393, 419 (D.Col. 1977) (expert witnesses fees awarded because the claim "could not have been established nor a viable desegregation plan determined" without expert testimony) *Wallace v. House*, 377 F. Supp. 1192 (W.D.La. 1974) and cases cited therein; *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 382-83

(D.D.C. 1983) (awarding fees in a Title VII action for "all expenses incident to the litigation that are normally billed to fee-paying clients, are reasonably incurred in the litigation, and are sufficiently documented."). *See also, Commonwealth of Pennsylvania v. O'Neill*, 431 F. Supp. 700 (E.D.Pa. 1977)

While the *Northcross* language noted above would seem to limit certain investigation and witness fees, it is not clear that such is the law of the Sixth Circuit This *Northcross* language could be read merely as *dicta* to guide the district court on remand. It is not informed by either the prevailing trend in other circuits nor by lower court opinions in this Circuit. This Court, in *Greenspan v. Automobile Club of Michigan*, 536 F. Supp. 411 (E.D. Mi. 1982), followed in *NAACP v. Detroit Police Officers Ass'n.*, 620 F. Supp. 1173 (E.D. Mi. 1985), has allowed actual costs for expert witnesses under a civil rights attorney's fees statute and not limited to the $30 per day statutory limits of 28 U.S.C. § 1920. The *Greenspan* test is whether the experts were reasonable and necessary in the service of the litigation. Such a ruling is consistent with the prevailing case law trend and the purposes of § 1988. Such reasoning would apply the reasonable and necessary test to pretrial preparation in cases that are settled since only such an extension would serve the remedial policy considerations of §§ 1983 and 1988 and the public policy considerations of furthering consensual and cooperative resolution of these disputes by negotiated settlements.

e. An Offer of Judgment and Attorney's Fees under § 1988

In the present case, defendants made an offer of judgment which plaintiffs- rejected. Fed. R. Civ. P 68 provides if a timely pretrial offer of settlement is not accepted and the final judgment does not exceed the offer, "the offeree must pay the costs incurred after the making of the offer." *Marek v. Chesny*, 105 S.Ct. 3012 (1985), held that "costs" in Rule 68 included attorney's fees under 42 U.S.C. § 1988 since these are awarded "as part of the costs." Thus, if the final judgment is not more favorable than the rejected offer of judgment, a prevailing plaintiff "will not recover attorney's fees for services performed after the offer is rejected." 105 S.Ct. at 3018. In *Marek*, the final judgment was by trial as in many other reported cases. While no reported cases were

found, the Rule 68's language, and the policy considerations underlying it, should include a final judgment reached by settlement.

III. FINDINGS OF FACT

A. STIPULATION OF PARTIES REGARDING CERTAIN OF DEFENDANTS' OBJECTIONS:

As part of their response to the petitioners application for fees, the defendants objected that a number of the hours were inadequately described as to the work performed (Objection 3); that they involved a duplication of effort among the various counsel for the plaintiffs or excessive times for the tasks accomplished (Objection 4) the work was performed on unsuccessful or unresolved claims in the lawsuit (Objection 5); and also that certain of petitioner Bennett's fee requests were not supported by contemporaneous time records for periods prior to the Fall of 1982. (Defendants' Objections to Fee Petitions filed January 2, 1986).

The parties have entered into a stipulation regarding these particular objections. As part of that stipulation, all of these objections shall be fully resolved by a deduction of 6.5% of the total hours set forth in each of the petitions filed by plaintiffs' attorneys. The reductions agreed to are as follows:

LARRY BENNETT

Hours	1,9993.25
Less 6.5.%	129.56
Adjusted Balance	1,863.69

IUDITH MAGID

Hours	1,078.00
Less 6.5%	70.70
Adjusted Balance	1,007.93

PATRICIA STREETER	
Hours	905.00
Less 6.5%	58.83
Adjusted Balance	846.17
MICHAEL BARNHART	
Hours	385.00
Less 6.5%	25.03
Adjusted Balance	359.97
THOMAS LOEB	
Hours	493.65
Less 6.5%	32.09
Adjusted Balance	461.56

In entering into this stipulation, the defendants reserve any and all objections they have made to the petitioners' fees with regard to their claims that plaintiffs' attorneys have waived their claims to fees, that they do not qualify for prevailing party status (Objection 2), and that their fee petitions are excessive due to the limited degree of success in light of the *U.S.A.* case (Objection 7).

The defendants' other objections are that the hourly rates asserted by the petitioners were unsupported by market rates in similar cases by attorneys with similar qualifications and were excessive in light of the ineffective management of the case or the type of work performed and failed to account for the historic rates charged in years prior to 1985.

B. SPECIAL MASTER FINDINGS:

1. Conditions of Confinement at SPSM-CC

Since the *Hadix* issues concerning the physical conditions and administration at SPSM-CC were resolved by the consent decree, there were no formal findings of which, if any, conditions at the prison were sufficiently severe as to be violations of the Constitution. While this matter did not need to be resolved on the merits of the case, the conditions of the prison are relevant to the significance of the results obtained in determining petitioners' appropriate attorney's fees.

Smith and *Seaway, supra*, note that 42 U.S.C. § 1988 "authorizes a district court to assume that the plaintiff has prevailed on his fee-generating claim and to award fees appropriate to that success." 104 S.Ct. 15 3467, 791 F.2d at 454. In determining a reasonable attorney fee, the issue of the significance of the relief obtained can be resolved without this Court making specific and detailed findings on each of the prison conditions challenged in the litigation. It suffices for the Court to make a general determination that the conditions leading to the litigation constituted grounds for a good faith constitutional claim and further that the relief obtained provided a significant remedy for those conditions.

Accordingly, it is found that the *Hadix* litigation involved a prison facility that was in an extreme state of disrepair involving conditions of confinement sufficiently severe to warrant plaintiffs' claim that the Eighth Amendment was violated.

2. Significance of the Relief Obtained

The *Hadix* consent decree provided an adequate remedy to the worst conditions of confinement alleged by the plaintiffs as well as the areas of concern expressed by the United States Department of Justice in its report and through its employees.

A substantial number of inmates will benefit from the *Hadix* consent decree, including not only the class members but all future Michigan inmates coming through the Reception and Guidance Center or being assigned to SPSM-CC.

The results obtained in this case are in no way lessened because they were achieved through negotiations instead of trial and court order. Notwithstanding the conflicts between counsel during the protracted *Hadix* negotiations, the achievement of this negotiated settlement is likely to lead to smoother implementation of the consent decree and create an atmosphere of cooperative interaction. These results would likely not have been achieved had the matter necessitated a trial and a court ordered remedy. As a result, the lawyers services involved in the negotiation of this consent decree were of equal value to attorney time that would have been spent in the continued preparation and/or trial of the matter.

The negotiated results obtained in the consent decree of this case serves the interest of the plaintiffs, the defendants, and the public by resolving a substantial, complex and politically controversial issue.

3. Relief Obtained and Relief Sought

Plaintiffs in their First Amended Complaint sought both declaratory relief as well as an injunction prohibiting the defendants from confining prisoners at SPSM-CC. The relief obtained in the *Hadix* consent decree includes: improvements in the physical conditions, staff training, sanitation, fire safety, physical and mental health care, law library facilities and access, as well as provisions undertaking and implementing a management and organization study to improve prison administration, and rights of enforcement for the inmate class. The prisoners enforcement rights include conciliation, mediation, and possible court intervention to enforce not only constitutionally prohibited conditions at SPSM-CC, but also conditions-that violate state law and the prison's own procedures, policy guidelines and operating principles. While plaintiffs did not petition for improvement of the prison conditions as an alternative to closure of the facility -- possibly as a matter of litigation and negotiation tactics -- the relief sought in negotiations and obtained by the petitioners on behalf of the plaintiffs' class is significant and for all purposes serves as a reasonable and adequate substitute for the relief requested. Since the plaintiffs' class litigation was aimed, broadly speaking, at relief from the unconstitutional conditions of confinement that they faced, the relief obtained in the Consent Judgment effectively achieved this overall goal of the plaintiffs' litigation.

4. Relation of U.S.A. Decree and the Hadix Decree

The results obtained in *Hadix* achieved more protections for inmates than were obtained in the *U.S.A.* case. This finding has been earlier made by this Court in the February 6, 1986, Memorandum Opinion and Order denying Defendants' Motion for Summary Judgment and was also acknowledged by Judge Richard Enslen in his *U.S.A. v. Michigan* opinion of December 2, 1985, at p. 11. Unlike *U.S.A.*, the *Hadix* decree

provides for Implementation of an organization and management study and plan that will result in the division of SPSM-CC into separate administrative prison units. Unlike *U.S.A.*, the *Hadix* decree provides a means of enforcement directly by prison inmates. Unlike *U.S.A.*, the *Hadix* decree provides remedies and enforcement powers not only for unconstitutional conditions of confinement but also other severe conditions that fall short of being unconstitutional. Unlike *U.S.A.*, the *Hadix* decree provides for enforcement of state statutes affecting SPSM-CC and also Department of Corrections' written procedures, policy guidelines and other operating principles. Unlike the *U.S.A.* decree, the *Hadix* decree provides for mediation on disputes arising on compliance. The *Hadix* decree is also more extensive and more specific than the *U.S.A.* decree and therefore will be easier to monitor and enforce.

Notwithstanding the fact that the *U.S.A.* Consent Judgment was entered at a point in time earlier than that of *Hadix*, the *Hadix* litigation preceded the *U.S.A.* case. Plaintiffs' counsel in the *Hadix* case provided significant assistance on information and access to witnesses to assist members of the Justice Department in their bringing of the *U.S.A.* case.

The *Hadix* case was initiated both prior to the initiation of *U.S.A.*, as well as prior to the initiation of the investigation that led to the *U.S.A.* case.

Most of the information obtained by the attorneys and/or experts involved in the *U.S.A.* case was not shared with the counsel in *Hadix* in a timely manner that would provide them any substantial assistance.

While defense counsel in opposition to plaintiffs' fee petitions has asserted that the *U.S.A.* case eclipses the *Hadix* case and that the results achieved in *U.S.A.* achieved in substantial part everything that was obtained in the *Hadix* consent decree, it was earlier the position of various representatives of the Attorney General's office during early 1984, prior to the acceptance of the *U.S.A.* consent decree, that the *Hadix* case was a separate litigation and that while dealing with significant areas of overlap with that of *U.S.A.*, it

was to be treated as a separate litigation and negotiated separately in good faith. It was also suggested to Judge Enslen by Assistant Attorney General Andrew Quinn that the language in paragraph "M" of the *U.S.A.* consent decree -- that states the *U.S.A.* decree shall not operate to render *Hadix* moot -- was unnecessary language and that Mr. Quinn could think of no grounds to argue any issue preclusion in *Hadix* as a result of the entry of the *U.S.A.* consent decree.

In passing CRIPA, 42 U.S.C. § 1997, Congress did not intend that statute nor suits brought by the Justice Department under it to derogate the rights of any inmates to enforce their legal rights under 42 U.S.C. § 1983 or § 1988. *See* 42 U.S.C. § 1997j., and S.Rep. 96-416 at 31, in 1980. U.S. Code Cong. and Adm. News, at 813.

Finally, the current Director of the Michigan Department of Corrections, Robert Brown, acknowledged that the *Hadix* decree went beyond the *U.S.A.* decree and would take additional state funds to implement. (Petitioners' Exhibit #1.)

5. Nature of the *Hadix* Litigation.

The *Hadix* case involved novel and complex issues of constitutional law.

The *Hadix* case involved complex, multifaceted issues of fact. The handling of the *Hadix* case required attorneys of special skill and experience in complex federal civil rights law as well as in litigation requiring protracted discovery, advocacy and negotiations on multiple areas.

The defendants' in the *Hadix* litigation, through their counsel, the State's Attorney General's office, vigorously resisted the factual and legal allegations of the plaintiffs. In their zealous defense, they undertook extensive discovery and filed numerous complicated pretrial motions regarding the sufficiency of the plaintiffs' allegations and proofs.

6. Degree of Risk

From October of 1980 until January 28, 1983, when defense counsel indicated a willingness to negotiate a

settlement and not to contest the issues of liability, the overall situation in the *Hadix* case involved a substantial risk of loss. (As suggested by the Supreme Court in *Delaware Valley*, this period shall hereinafter be noted as *Litigation Phase I.)* This risk was a product of limitations in constitutional tort law on conditions of confinement, complex factual disputes regarding the physical and administrative conditions at SPSM-CC, as well as the vigorous opposition and zealous legal services provided by the Attorney General's office on behalf of the defendants.

By June 1982, the Justice Department in its report (the Schoen Report) and the October 29, 1982, letter from William Bradford Reynolds to Governor Milliken also noted substantial failings in the physical conditions at SPSM-CC that suggested unconstitutional conditions of confinement. The Reynolds letter warned that the Justice Department would commence a CRIPA action. Plaintiffs' counsel did not have access to the Schoen Report to know the specifics and the significance of its findings at any time during *Litigation Phase I.* The Schoen Report was turned over to plaintiffs' counsel by court order in May of 1983 during the initial stages of the negotiation of the *Hadix* consent decree.

While the risk of loss was substantial in *Litigation Phase I* (October 1980 through January 28, 1983), the risk of loss continued, though at a substantially lower degree, from the period of January 1983 through the pretrial meeting with the Court on June 14, 1984, at which time it became clear that a negotiated settlement and consent decree would likely be achieved. (This January 29, 1983 - June 14, 1984, period shall be referred to as *Litigation Phase II*. Periods after June 14, 1984, shall be referred to as *Litigation Phase III.*)

While the process of negotiations was undertaken in the Spring and Summer of 1983, towards the end of that year and at the beginning of 1984 it appeared that negotiations would not result in a consent judgment and that trial would be necessary. During that period of time, the Court set up a schedule for final pretrial discovery, pretrial conferences, and trial dealing with the issues of the *Hadix* case that might not be resolved. Mr. Brian MacKenzie was defendants' chief counsel for purposes of litigation. He was taken off of the *Hadix* case

after the January 28, 1983, final pretrial conference in the anticipation that the matter would be resolved by negotiations. Mr. MacKenzie became involved again in 1984 when it appeared the case would require trial. Mr. Bennett told Judge Enslen on March 23, 1984, that negotiations had broken down and trial was anticipated in June or July of 1984. (*U.S.A.* March 23, 1984, hearing transcript, p. 13.) Even now the defendants assert that they did not concede liability. (See MacKenzie and Fischhoff affidavits filed March 21, 1986). It was only following the exchange of proposals in March through mid-June of 1984, as well as the defendants' expressed willingness to implement the findings of a management study, that it appeared at the meeting with the Court of June 14, 1984, that settlement was virtually assured. Thus, it is found that only as of June 14, 1984 (the end of *Phase II*) was there no further degree of risk of loss in this matter.

7. Attractiveness of the Hadix Litigation and Burdens on Plaintiffs' Counsel

The *Hadix* case was an unattractive one for attorneys in private practice to undertake because of a number of factors: (1) the substantial time involvement that would be required of plaintiffs' attorneys; (2) the protracted litigation against vigorous opposition that it would likely entail; (3) the substantial expenses and expert witness fees they would need to advance; (4) the lack of fee-paying clients; and (5) the risk of loss. Certain lawyers from prominent Detroit law firms refused to become involved in the *Hadix* case, and even Mr. Loeb's firm expresses reservations about his involvement.

Each of the petitioners' involved in the *Hadix* case were limited in their ability to undertake other legal work for which there would have been been greater assurance of reasonably prompt payment of attorney's fees and any costs expended. Each of the petitioners involved in the *Hadix* case were limited in their ability to undertake other legal work that would have been more certain to enhance their future law practice.

8. Costs and Expenses

Substantial costs and expenses were advanced in *Hadix*

by Larry Bennett, and lesser amounts of costs were advanced by the other plaintiffs' counsel. These costs, particularly the expert witnesses concerning the conditions and administration of SPSM-CC and the Reception and Guidance Center, were reasonable and necessary to adequate preparation of plaintiffs' case for trial and the information obtained was helpful in achieving the Consent Judgment. Such costs are of the type ordinarily reimbursed by the client. In the present case, the costs and expenses will not be recouped by petitioners in the absence of their inclusion in a § 1988 fee award.

9. Petitioners' Retention of Expert Consultants

Counsel for plaintiffs were involved in litigation requiring expert witness assistance on the physical plant including architectural and sanitation systems, upon correctional practices and management, nutrition, classification, and psychological care. The hiring of these expert consultants in a complex, multi-faceted prison case was reasonable and necessary to the proper preparation of the case for trial or a negotiated settlement.

Not to award such expenses upon settlement instead of trial would discourage negotiated resolutions of civil rights claims and would also handicap prisoners' attorneys in proper preparation and fulfilling their obligations to their clients under Canon-6 of the Code of Professional Responsibility.

10 Quality of Petitioners' Legal Services

The legal representation provided by petitioners to plaintiffs was of the highest professional quality.

11. Reasonableness of the Petitioners' Attorney Time

a. Attorney Time Spent on the Merits

The question of whether the time spent by petitioners on the merits of the case was reasonable and related to the issues upon which they prevailed is mooted by the stipulation of counsel to a percentage reduction of 6.5% for inadequately

described work or work that was excessive, duplicative or performed on unsuccessful or unresolved claims. (See Appendix B).

b. Time Spent on the U.S.A. Case

The time spent by plaintiffs' counsel pursuing limited intervention and exclusion from the *U.S.A. v. Michigan* decree before Judge Richard Enslen was reasonable and appropriate action to protect the legal position of the *Hadix* class and assure that the ultimate consent decree was not undermined by the *U.S.A.* decree or enforcement. While Judge Enslen granted the Hadix petitioners limited standing as *amicus curiae* (*U.S.A.* Consent Decree ¶ 0) and clarified the relation between *U.S.A.* and *Hadix* (*U.S.A.* Consent Decree ¶ M) , he denied their exclusion from the *U.S.A.* decree. Nonetheless, the efforts of the *Hadix* attorneys did alert Judge Enslen to the care needed in the future not to allow the *U.S.A.* decree to undercut *Hadix*, and further provided the *Hadix* counsel with future standing as *amicus curiae* and with access to information copies of the *U.S.A.* implementation plans and reports (*U.S.A.* Consent decree ¶¶ I, K and L) as well as any proposals for modification of the *U.S.A.* decree (*U.S.A.* Consent Decree ¶ J)

c. Attorney Time Pursuing the § 1988 Fee Award.

The fee petitioners have submitted supplemental petitions for attorney's fees and costs involved in pursuing this fee petition. The fee petition issue and hearings have been vigorously resisted by defendants and their counsel which has led to extensive preparation, briefings, and hearings on these issues. The petitioners' time spent on this § 1988 matter was reasonable and necessary to meet the zealous defense to the attorneys' fee petitions presented by the assistant attorney general involving disputes of law and fact on prevailing party status, the hours and rates to be compensated, and any adjustment. The Sixth Circuit and other courts allow such fees to effectuate the purposes of § 1988. *Northcross, supra* at 637, citing *Weisenberger v. Huecker*, 593 F.2d 49 (6th Cir. 1979).

There were, however, certain inefficiencies and duplication in the Bennett petition due to the involvement of separate outside counsel who were unfamiliar with the

extensive history of the *Hadix* litigation. There are also certain legal services on the fee petition on issues upon which the plaintiffs' counsel do not prevail.

12. Dr. Stiffman's Statistical Analysis

Dr. Lawrence Stiffman is an expert statistician with knowledge and experience in determining the fair market value of attorney's fees in the Southeastern Michigan area. His initial, February 10, 1986, determination (Defendants' Exhibit 3) of an appropriate hourly speciality rate of $90 for all attorneys narrowly defined speciality as requiring 100% of the attorney's time in that field. Specialization experience can be achieved by an attorney who spends 25% or more of his or her time in a specific area of legal practice. Thus, Stiffman's supplemental data of April 18, 1986 (Defense Exhibit 3A), by using this broader and more realistic definition of specialization, more accurately indicates median hourly rates of attorneys with specialized federal litigation experience similar to most of the petitioners. That exhibit shows a median hourly rate of all Michigan attorneys of $75 per hour as of the survey date, July 1984. It shows median rates for specialists of $100 for attorneys practicing 10 years or more in the fields of civil rights, securities law, antitrust, bankruptcy, and labor law. (Dr. Stiffman's Exhibit 10 of Defendants' Exhibit 3A). These speciality fields are comparable to those of petitioners Bennett, Magid, Loeb, and Barnhart. Dr. Stiffman's Exhibit 3A shows attorneys with 10 - 14 years practice in speciality fields who were at the 75th and 90th percentile billing $120 and $125 respectively

The 1981 State Bar of Michigan Economics of Law Practice Survey shows a median Michigan hourly rate for full-time practice of $65 per hour as of the April 1981 sampling date. (Michigan Bar Journal, February 1982). The 1984 survey shows a ten dollar increase in median hourly rates for all Michigan attorneys in the three years. It is judicially noticed under Fed. R. Evid. 201 that the Consumer Price Index from 1984 to April 1986 shows an increase for all items of 4.6% (from 311.1 to 325.5). These data would suggest that Dr. Stiffman's rates from the Summer of 1984 are $5 - $6 lower than current market value rates. This is consistent with the federal litigation specialists' affidavits of current billing rates

in Plaintiffs' Exhibits 12, 13, 14, 15, and 16 showing a range of $125 to $155. These exhibits accurately reflect current market rates for highly respected attorneys of substantial experience in the Detroit area who are involved in federal litigation.

Years in practice for attorneys Magid, Barnhart and Loeb should include years these attorneys spent in legal services or public defender work since these experiences provide opportunities for professional growth comparable to private practice, particularly at a law reform unit of a major metropolitan legal services program such as the Center for Urban Law where Ms. Magid and Mr. Barnhart worked. Dr. Stiffman's initial submission considered only years in *private* practice for Magid, Loeb and Barnhart.

13. Delay In Payment

Delay in payment of costs and attorney's fees causes lost use of the funds as well as an erosion of purchasing power due to inflation.

It is judicially noticed under Fed. R. Evid. 201 that the Consumer Price Index for all items was the following:

1980	246.8
1981	272.4
1982	289.1
1983	298.4
1984	311.1
April 1996	325.5

Thus, there has been a cummulative inflation of over 30% during the course of the *Hadix* litigation.[8] It is also judicially noticed under Fed. R. Evid. 201 that federal court post-judgment interest rates, determined by Department of Treasury 52-week Treasury Bills, have exceeded 6% interest throughout the period of this litigation, were above 10% much of the time, and on numerous occasions exceeded 12%.

Some courts adjust the lodestar upward to account for delay in payment, others use an hourly rate charged at the time of the filing of the fee petition (the "current rate") rather

[8] The increase from 246.8 (1980) to 325.5 (April 1986) is 31.88%.

than lower hourly rate that might have been applicable at the time the service was rendered ("historic rate"). *See e.g., In re Agent Orange*, 611 F. Supp. 1296, 1327 (S.D.N.Y. 1985), *Copeland v. Marshall*, 641 F.2d 880, 893 n. 23 (D.C. Cir. 1980) (*en banc*). The Supreme Court has not addressed this issue. The Sixth Circuit has established no fixed rule other than that the district court should consider the impact of inflation in considering the use of an historic or current value rate. *Louisville Black Police Officers v. Louisville*, 700 F.2d 268, 274 (6th Cir. 1983). *Northcross v. Board of Education*, 611 F.2d 624, 640 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

In the present case, the use of the current rate instead of an historic rate is appropriate to adjust for lost interest and inflation due to delay in payment. If one were to take the median attorney fee for non-specialists in 1980 ($65.00)[9] and adjust by compounding interest figured at 3% over the inflation rate [10], the $65 (1980) figure would be $90 in 1984 and in excess of $100 in 1986. The last median rate available of all non-specialist attorneys in Michigan surveys was for 1984, it was $75 per hour. This is below the $90 (1984) computed above by compounded interest rates. This suggests that use of current market rates does not overcompensate the petitioners but slightly under compensates them since it primarily reflects inflation and not lost use of money. The reality that not all billings are collectible is a factor that lessens the impact of any under compensation resulting in the use of the current rate in lieu of an adjustment for delay in payment.[11] Since § 1988 does not mandate exactitude but seeks to arrive only at a reasonable rate, use of the current billing rates is a sufficient upward adjustment to compensate for delay in payment in the present case. Its use will avoid determining precisely when each of the five petitioners raised their historic rates, what interest rates should be used for each year, and the substantial task of computing compounded

[9] Unfortunately, the 1981 Survey did not report a specialist median rate, thus a comparison of the 1981-1984 Survey results is done on the median attorney rate for all Michigan attorneys.

[10] 1980/81 - 13%, 1981/82 - 9%, 1982/83 - 6%, 1983/84 - 7%, 1984/85 - 6%, 1985/86 - 6%.

[11] The 1984 Economics Survey found "Over 32 percent of the respondents report that upwards of 8% of their billed fees are not collected." Michigan Bar Journal, December 1985 at p. 1312.

interests for each year for each petitioner.

14. Larry Bennett

Larry Bennett was lead counsel in the *Hadix* case, assisted in part by Judith Magid. He was the initial attorney involved for the plaintiffs. He had primary responsibility for coordination and direction of the plaintiffs' case. Mr. Bennett has practiced law since 1976. He has an excellent reputation as a skillful and diligent civil rights attorney. He has certain national recognition in the speciality field of prisoner litigation. Mr. Bennett has taught and lectured in the civil rights field.

The range of current prevailing market attorney's fees for federal litigation of similar complexity to the Hadix case is from $95 to $155 per hour. Attorneys from respected Detroit law firms doing federal litigation and with similar years of experience of Mr. Bennett charge $125 or more per hour. Mr. Bennett presently bills at $125 per hour for civil rights work and has been awarded civil rights attorney's fees in other cases at $125 per hour. Mr. Bennett seeks a base rate in *Hadix* of $150 per hour. A reasonable hourly rate for Larry Bennett for legal services performed on the merits of the *Hadix* case is $125 per hour.

Mr. Bennett has incurred the following expenses which were reasonable and necessary to preparation for litigation and the successful negotiated Consent Judgment in Hadix and in presentation of his fee petition:

David Fogel	Fees and Expenses	$ 4,113.34
Brad Fisher	Fees and Expenses	$ 3,384.01
Ezra Ehrenkrantz	Fees and Expenses	$10,211.20
Robert Powitz	Fees and Expenses	$ 849.00
John Apol –	Research performed in connection with defendants' motion for summary judgment [12]	$ 2,450.00

12 This is an attorney fee for work performed by Professor Apol that would otherwise have needed to be done by another petitioner counsel. Professor Apol's consulting fee is less than any of the hourly rates recommended in this report.

Depositions	$ 774.90
Witness fee, Dale Foltz	$ 40.00
Telephone	$ 935.68
Photocopy (2915 x $.10)	$ 291.50
Joint Bar Project Grant Expense [13]	-0-
Steve Berlin, Expert Witness Fee[14]	$ 870.00
Joseph Hardig Expert Witness Fee[15]	$1,040.00
Butzel, Keidan, Simon, Myers & Graham (See Section 15 below)	$10,086.00
TOTAL	$35,045.63

15. The Use of Outside Counsel to Represent Fee Petitioner:

Petitioner Bennett hired the law firm of Butzel, Keidan, Simon, Myers & Graham (a firm that he has now joined as an attorney) to represent his attorney's fees claim. The Court should look with particular scrutiny at such claims by attorney petitioners that they need to hire outside attorneys to represent them in fee petitions. Courts should be resistant to efforts that turn fee petitions under § 1988 into extensive adversarial contests which, in many civil rights cases, could eclipse the amount of attorney activity involved on the underlying merits of the case. While at times the petitioner attorney might find it awkward to take depositions, solicit self-laudatory testimony from other attorneys, or be able to

13 A grant of $5,000 from the Joint Bar Law Reform Project (JBCRP) to Larry Bennett with its conditional repayment provisions (Plaintiffs' Exhibit 19) is a separate contract between plaintiffs' counsel and the JBLRP. It is not an awardable cost.

14 The Berlin deposition ordinarily would not have been a reasonably and necessary expense to evaluate the degree of success. Yet, in the present case, the defendants' undertook adament efforts to portray the *U.S.A.* decree as a monumental outcome that made *Hadix* decree an anticlimax of insignificant proportion. This made petitioners resort to Mr. Berlin, the Justice Department lawyer in *U.S.A.*, a reasonable counter-move to establish the historical roots and true dimension of *U.S.A.* compared to *Hadix*.

15 Mr. Hardig's involvement was made necessary and reasonable to counter the forceful defense expert testimony of Dr. Stiffman. Mr. Hardig's testimony was initially proffered by petitioners cost in a cost efficient affidavit form. His live testimony was undertaken to accommodate defense counsel's request to cross-examine. Thus these costs are reasonable in pursuit of the fee petition.

maintain a professional distance from opposing counsel when the issue at stake is fees directly payable to that attorney, § 1988 fee petitions should be handled in a manner to minimize such dangers and eliminate the need for multiplication of attorneys. in these suits with the needless duplication of effort required to educate new attorneys about a case on which petitioning attorneys already have intimate familiarity.

In the present case, it was demonstrated by the other petitioners that they could adequately handle their own fee petitions. In the present case, Mr. Bennett has argued for and often been the principal spokesperson for the fee petitioners. It is not clear that retention of separate counsel was necessary.

The undersigned has made a detailed and elaborate review and comparison of the itemized billings submitted by Larry Bennett as well as those submitted by the Butzel, Keidan law firm regarding the preparation and presentation of the fee petition. Mr. Bennett has carefully omitted certain hours in which he was consulting with the Butzel, Keidan firm. The retention of outside counsel was inefficient in certain aspects and duplicative in others. More substantial hours need be omitted than the minimum numbers proposed by Mr. Bennett. While the use of outside counsel may have been a convenience and a comfort to Mr. Bennett, he has not made a sufficient demonstration that the use of the Butzel, Keidan firm was a necessary addition of attorneys to the fee petition proceedings. Nor has Mr. Bennett demonstrated that there was not a great amount of duplication caused by conferences between Larry Bennett and Richard Saslow or Bruce Sendek of the Butzel, Keidan firm, or between Messrs. Saslow and Sendek. At numerous discovery sessions, strategy and preparation sessions, and court hearings, both Mr. Bennett and either Mr. Saslow or Mr. Sendek would appear Mr. Bennett has not demonstrated the necessity for this duplication of attorney time. Mr. Bennett had expertise in the history and proceedings of the *Hadix* case, and particular knowledge with respect to his own personal involvement as an attorney in this case. It is duplicative for the Butzel, Keidan attorneys to spend time to gain this information from Mr. Bennett. The hours of the Butzel, Keidan attorneys becoming familiar with the case are being sought by Mr. Bennett even though he has excluded his own hours on this. Mr. Bennett

has not made a sufficient demonstration that any time was appropriate and necessary for this re-education process.

The billings do show certain hours in which Butzel, Keidan did legal work for Mr. Bennett that he would otherwise have had to do on his own behalf, for which he could be compensated under § 1988 in this fee petition.

Pat Streeter's retention of Ralph Sirlin to help prepare her testimony was also not demonstrated to have been necessary to the presentation of her fee petition.

This Special Master Report will not make detailed findings with respect to each time entry that is being found duplicative and unnecessary. The finding of reasonable and necessary hours on the fee petition for time that petitioner Bennett would have had to spend is made on the following criteria.[16] These criteria attempt to limit these costs to those portions of the Butzel, Keidan bill which provided services that Mr. Bennett otherwise would have reasonably and necessarily provided himself. In reviewing both the Butzel, Keidan and the Larry Bennett time billings, the finding excludes all meetings between Mr. Bennett as client and Butzel, Keidan as his attorneys as being unnecessary and duplicative. If Mr. Bennett had presented his own fee petition, much of the information communicated in these meetings would have been unnecessary since he would have had that knowledge at his own command.

Secondly, this fee petition, though elaborate in time and amount of facts involved, was not either factually so complicated nor involved any sufficiently complicated legal issues as to warrant the necessity for two, three, and even four Butzel, Keidan attorneys being involved in representing the Bennett petition alone. Accordingly, the findings exclude all inter-office attorney to attorney communication as being duplicative. The findings further exclude the billable hours either for the attorney from Butzel, Keidan or for Mr. Bennett for time preparing for or being involved in depositions or court hearings. Generally the findings include as reasonable the hours for Butzel, Keidan for preparation and the taking of the

16 The worksheets and notations applying these criteria are in the Bennett portion of the Judge's File on this fee petition.

depositions of Mr. Berlin and the assistant attorneys general involved in the *Hadix* and *U.S.A.* cases. No hours for Mr. Bennett or other petitioners are allowed for these depositions. The findings allowed the hours of Larry Bennett for preparation and time at court proceedings involved in these fee petitions and, accordingly, excluded any billings from Butzel, Keidan that were duplicative for these matters in court.

Reductions have also been made on the briefing done by Butzel, Keidan on the issues of attorney's fees, the importance of settlement, attorney's fees to be given to attorneys hired to pursue attorney's fees petitions, and enhancement. While petitioners are prevailing on the issue of receiving attorney's fees, they are not receiving the fee levels nor the degree of enhancement that they seek, nor is Mr. Bennett receiving more than a portion of his claim for attorney's fees for the Butzel, Keidan firm he hired. Accordingly, the petitioners are not prevailing parties on all issues upon which they submitted briefs in this fee petition. Petitioners do not prevail on enhancement for the quality of representation, nor the excellence of the results achieved. While an enhancement is being recommended for certain limited portions of the times submitted on the risk issue, the allowance and payment of this enhancement is dependent upon the outcome of the Supreme Court case to be decided this term in *Delaware Valley*.

Fees and costs are being permitted as reasonable and necessary for the taking of the December 20, 1985, deposition of Steve Berlin. No time is also being allowed for either Mr. Bennett or for the Butzel, Keidan firm for efforts to continue and take the deposition of Steve Berlin on December 30, 1985. The necessity of a continuation, which evidence this Special Master excluded as not being in compliance with the court rules on stipulations for telephonic depositions, was necessitated solely by the inadvertence of the petitioners' counsel in supplying Mr. Berlin with an incomplete copy of the *U.S.A.* decree that omitted its State Plan. The defendants should not be required to pay attorney's fees in efforts to remedy this problem.

16. Judith Magid

Judith Magid assisted Larry Bennett as lead counsel in the *Hadix* case until October 1984 when her illness necessitated a lesser role. Ms. Magid had practiced law since 1974. She had an excellent reputation as a skillful and diligent civil rights attorney. She had extensive experience in prisoner litigation and had developed a certain national recognition in this field. She had testified, written, lectured, and consulted on prisoners' rights. She had had few clients billed at hourly rates, though she had billed at $100 per hour. She had received attorney's fee awards figured at $100 per hour and one settled for a 10% reduction for duplication, using a $125 per hour base rate. Ms. Magid sought $150 per hour as a base rate. A reasonable hourly rate for Judith Magid for her services on the merits of *Hadix* is $120 per hour.

Ms. Magid incurred the following expenses which were reasonable and necessary to preparation for litigation and the successful negotiated Consent Judgment in *Hadix*:

Travel expenses related to the Hadix litigation	$782.85
Long distance Telephone	159.88
Photocopying	53.00
TOTAL	$995.73

It was necessary for the Magid petition to be presented by Patricia Streeter representing the Magid estate. The hours for this are properly allocated to the Streeter petition discussed below.

17. Thomas Loeb

Thomas Loeb was brought into the *Hadix* litigation in May of 1981. Mr. Loeb has practiced law since 1976. He is experienced as a trial attorney and has substantial experience in civil rights litigation. Mr. Loeb has lectured on civil rights litigation and taught criminal trial advocacy. Mr. Loeb was principally involved when it was believed *Hadix* would go to

trial. His relative involvement in *Hadix* was substantially reduced after the January 28, 1983, pretrial conference when a settlement was proposed. Mr. Loeb did not have the degree of responsibility or involvement in *Hadix* as did attorneys Bennett or Magid. Mr. Loeb testified that he has in the past routinely billed at $125 per hour which he seeks in his fee petition. A reasonable hourly rate for the services Thomas Loeb performed on the merits of *Hadix* is $110 per hour.

Unlike other petitioners, Mr. Loeb has not submitted by the June 9, 1986, cut-off on all fee petition submissions any itemization or other breakdown of the $3,195.17 in costs he claims. Mr. Loeb represented himself on the fee petition and has submitted a supplemental itemization of hours that are found to be necessary and reasonable except for three hours attending the Bennett deposition.

18. Michael Barnhart

Michael Barnhart became involved in *Hadix* shortly before the anticipated trial in early 1983. He has been involved in law practice since 1968. While he had substantial civil rights litigation and negotiation experience, Mr. Barnhart had no substantial prisoners rights litigation experience prior to *Hadix*. Mr. Barnhart was involved in the psychiatric care of prisoners in the negotiations and also served as backup to Patricia Streeter on fire safety and to Larry Bennett on the physical plan. Mr. Barnhart's responsibilities and involvement in the case were less than attorneys Bennett and Magid. Mr. Barnhart has little of his practice billed at an hourly rate though he presently bills at $125 per hour. He has been awarded $100 per hour for a small consulting role in *NAACP v. Detroit Police Department* and seeks $150 per hour for his services in *Hadix*. A reasonably hourly rate for Mr. Barnhart's legal services on the merits of *Hadix* is $110 per hour.

Mr. Barnhart's supplemental affidavits and itemizations for hours expended on the fee petition are found to be reasonable and necessary excepting 12 hours spent attending other attorneys' depositions which were not necessary and were duplicative of other petitioner's time.

Mr. Barnhart has incurred the following expenses which were reasonable and necessary to the *Hadix* litigation:

Xeroxing	$ 133.60
Federal Express	11.00
Long Distance	243.00
Consultant Expert to Counter Defendants' Expert re: State Bar Survey	225.00
TOTAL	$ 612.60

The $75 copy of his own deposition was a convenience but not a necessary expense. Mr. Barnhart has not sought compensation for attorney Jeanne Mirer of his office who participated in the hearing of this matter.

19. Patricia Streeter

Patricia Streeter became involved in *Hadix* in December of 1982. Ms. Streeter was admitted to practice in 1979. Prior to *Hadix*, Ms. Streeter practiced primarily criminal law and had little civil litigation experience outside divorce and probate work and some plaintiff's personal injury work. Throughout the *Hadix* litigation Ms. Streeter's experience in prisoner litigation and her responsibilities have increased. In the final Litigation *Phase III*, only, Larry Bennett surpassed Ms. Streeter in time involvement in Hadix. While Ms. Streeter does only a limited practice on an hourly rate, she charges $100 an hour for non-complex cases and$125 per hours for complex cases. She seeks $100 per hour in her petition based on a $90 average base rate plus a $10 enhancement due to the case complexity. A reasonable hourly rate for Ms. Streeter's legal services on the merits of *Hadix* is $95 per hour.

Ms. Streeter has also filed a detailed itemized affidavit for costs, primarily for photocopying, long distance telephone calls, postage, and certain prisoner publications relevant specifically to the *Hadix* litigation and not an ordinary attorney library item. These costs are found to have been reasonable and necessary to obtaining the *Hadix* Consent Judgment and are as follows:

1983	$ 345.85
1984	651.57
1985 through May 15	437.50
TOTAL	$1,434.92

Ms. Streeter has filed a supplemental affidavit of hours spent for herself and Ms. Magid on the fee petition which is found to be reasonable and necessary except for 7.4 hours attending the Bennett and Berlin depositions that are duplicative. She was represented during her testimony at the fee hearing by Jeanne Mirer, for whom she does not seek compensation. As noted above in 15, the attorney time of Ralph Sirlin, who prepared her for her testimony, have not been demonstrated to have been a necessary expense.

20. Prison Legal Services:

Petitioner Streeter requests in her application $5,914.60 in costs to Prison Legal Services of Michigan, Inc., including $3,362.90 for copying plaintiffs' documents and $301.70 for hours copying and $2,250.00 for 30 hours of attorney time of research on an Access to Courts injunction. On December 22, 1981, plaintiffs petitioned this Court to order that the state preserve the availability of Prison Legal Services, which injunction was granted January 15, 1982. It is recommended that this cost not be reimbursed since it would appear that the state has already paid for the staff time and xerox services of Prison Legal Services under the injunction.

21. Hourly Rates for Fee Petition Work

To arrive at "a fair and equitable fee", the Sixth Circuit has indicated in several opinions that it is desirable, whenever possible, to vary the hourly rate awarded depending upon the type of service being provided. *Northcross, supra*, 611 F.2d at 638. While requiring a sophisticated knowledge of the case facts, law and history, the legal work for preparing and pursuing a fee petition in this case is less complicated and demanding than the legal work on the merits of this civil rights claim.

The factual and legal matters involved, though extensive in quantity, are far more manageable than the legal and factual issues involved in seeking court intervention on constitutional grounds to remedy the problems at SPSM-CC. Fee petitions are, in substantial part, accounting matters. In this case, substantial briefings were involved on prevailing party status and questions of waiver due to the positions asserted by defense counsel. Yet, these issues were more easily resolved given the trial judge's familiarity with the case than would be issues on the merits. After the Court's resolution of prevailing party status and waiver, substantial time was spent on the less intellectually demanding tasks of determining appropriate market rates for attorneys and the hours to permit in the fee petition. To the extent there was a great deal of data involved, this factor will be reflected in the additional number of hours for which fees are being awarded. A fair hourly rate for all attorneys' hours involved in the fee petition is $90 per hour. This rate is higher than the median Michigan attorney rate Dr. Stiffman found in his 1984 survey and is likely higher than the average median rate adjusted for inflation to 1986. It is the median rate Dr. Stiffman found for federal litigation specialists. A differential on billable rates for work on the merits of the case and on fee petition work is appropriate not only because of the substantially different nature of the issues involved and the requisite skills and experience needed to handle them, but also courts use of varied rates will discourage unnecessary preparation, discovery, and litigation on the fee petition issue that might be encouraged if the slightly higher "merits issues" rates were to be used.

The hours expended on the fee petition also have not involved substantial periods of delay. Nor did they involve a sufficient contingency or risk factor for which any enhancement is warranted. While the defendants put up a vigorous defense to any fee petitions being permitted, it quickly became clear from the Court's rulings on the prevailing party and waiver issue that the issue to be resolved was not whether the petitioners would receive any fees in this case, but merely how much they would receive.

Even at this reduced hourly rate, the recommended attorney's fees for work done on the fee petition are an amount in excess of $75,000.

IV. RECOMMENDATIONS

A. Adjustment of Fees of the Lodestar in Light of Superior Representation, Complexity, Degree of Success or Lack Thereof:

1. Enhancement: As noted in section I of this opinion, *Delaware Valley* clarifies that upward adjustments are only to be provided in the most extraordinary of circumstances. The superior quality of attorneys' services in the case and the degree of success are ordinarily subsumed in the hourly rates and in the number of hours involved in a case in arriving at the lodestar figure. In the present case, the quality of counsel and their superior services are adequately measured by their hourly rates, and the complexity of the issues and the degree of success are appropriately reflected by the number of hours utilized in determining the lodestar. Accordingly, it is recommended that no upward adjustment be made to the lodestar figure based either on superior services of counsel, complexity, or upon degree of success.

2. Downward Adjustment: While the parties have entered into a stipulation regarding reduction of the number of attorney hours claimed, defendants continue to assert that the fee award should be limited, if not altogether precluded, by the limited degree of success achieved by plaintiffs. They assert (1) that the success achieved was not what plaintiffs sought -- prohibition of housing inmates at SPSM-CC -- and (2) that the success achieved was insignificant since it was a reiteration of what had already been achieved in *U.S.A.*

For the reasons set forth in the findings, it is recommended that no downward adjustment be made to the lodestar either because the relief obtained is not identical to that initially sought nor because of the outcome of the *U.S.A.* case. The effects of parallel litigation in *U.S.A.* is considered in limiting the enhancement recommended for risk of loss.

B. Enhancement for Risk of Loss:

As noted in Finding 6 above, there was a substantial degree of risk of loss during *Hadix* Litigation Phase I (October 1980 to

January 28, 1983) and a reduced risk of loss in Litigation Phase II (January 29, 1983 to June 14, 1984). Only after the settlement was agreed to in concept, on or about June 14, 1984, did the risk of loss end. Determining the risk factor is one of the elements of a fee determination least amenable to precise determination. For this reason, the Special Master has reviewed other cases awarding a contingency enhancement for risk of loss.[17]

While difficult to determine, a risk enhancement is not an arbitrary bonus but rather a real component of a reasonable fee to account for the contingency of no recovery of any fees. The recommended risk enhancement takes into consideration the relative novelty and difficulty in the use of the Constitution to intrude into the administration of state prisons as well as courts' reluctance to do so in other than extreme situations. Account is also taken of the complexity of the facts and the vigorous and tenacious defense mounted by the Michigan Attorney General's office.

While the defense has argued that the parallel litigation in *U.S.A.* should defeat prevailing party status or diminish the significance of the outcome in *Hadix*, courts have more commonly considered parallel litigation, especially that by the

17 *Burger v. CPC International, Inc.*, 76 F.R.D. 183 (S.D.N.Y. 1977)
(30% increase on straight billable time to compensate for risk of litigation)

Barnett v. Pritzker, 73 F.R.D. 430 (S.D.N.Y. 1977)
(33% increase as "risk factor bonus" on time spent on merits -- but only straight hourly rate for time spent in preparing fee application and administration of settlement since no more "risk of litigation")

Weiss v. Drew National Corp., 465 F. Supp. 548 (S.D.N.Y. 1979)
(15% risk factor bonus)

Blank v. Talley Industries, Inc., 390 F. Supp. 1 (S.D.N.Y. 1975)
(50% increase -- for risk, skill and experience, complexity, results)

Munsey Trust v. Sycor, Inc., 457 F. Supp. 924 (S.D.N.Y. 1978)
(30% increase as 'risk factor bonus" only to time spent on the merits. Straight hourly fee for time spent on fee petition and lower hourly rate for time spent on administration of settlement)

Barr v. WUI/TAS, Inc., 1976-1 Trade Cases ¶ 60725 (S.D.N.Y. 1976)
(20% increase for risk, results, novelty and difficulty of issues)

In re Master Key Antitrust Litigation, 1978-1 Trade Cases ¶61,887 (D.Conn. 1977)
(up to 100% increase for risk)

government, in determining risk of loss. As noted in findings 4 and 6, *Hadix* preceded the *U.S.A.* in time, and only in *Hadix* Litigation Phase II did plaintiffs obtain the Justice Department report in *U.S.A.* Similarly, it was in *Hadix* Litigation Phase II that the Justice Department brought its CRIPA suit in *U.S.A.* This parallel *U.S.A.* litigation did reduce the risk of loss in *Hadix* in Litigation Phase II.

In light of the above considerations, it is recommended that petitioners be awarded a 30% contingency enhancement for risk of loss for all hours of service in Litigation Phase I, and a 15% contingency enhancement for all hours of service in Litigation Phase II. It is further recommended that payment of the contingency enhancement portion of the fee award be deferred until the *Supreme Court* decides the § 1988 risk issue this term in *Delaware Valley*, but that interest under 28 U.S.C. § 1961(a) be allowed from the date of this Court's order. If the Supreme Court in *Delaware Valley* rejects § 19[illegible], this enhancement and any interest will, of course, not be allowed.

C. Individual Awards of Attorney's Fees and Costs:

It is recommended that the following attorney's fees and costs be awarded:

Attorney: LARRY BENNETT

ATTORNEY'S FEES:

	Hours Claimed	Reduced 6.5% Per Stip.	Times Hourly Rate	Risk Enhancement
Litigation Phase I (Through 1/28/83)	735.80	x 935 = 687.97	x $125/hr = $85,996.25	x 1.3 = $111,795.13
Litigation Phase II (Through 6/14/84)	915.30	855.81	x $125/hr = $106,976.25	x 1.15 = $123,022.69
Litigation Phase III (After 6/14/84)	321.0	300.14	x $125/hr = $37,517.50	x 1.0 = $37,517.50

Hours Reported In Original Fee Petition Devoted to Fee Petition	22.5	21.04	x $90/hr = $1,893.60	x 1.0 = $1,893.60
Supplemental Billings for Hours on the Petition Itself	185.80	Not Reduced 185.80	x $90/hr = $16,722.00	x 1.0 = $16,722.00
TOTAL	2,180.40	2,050.76	$249,105.60	$290,950.92
COSTS:			$ 35,045.63	$ 35,045.63
TOTAL ATTORNEY' S FEES AND COSTS			$284,151.23 Without Risk Enhancement	$325,996.55 With Risk Enhancement

Outside Counsel Retained by Larry Bennett to Work on Fee Petition

Attorney	Hours Worked	Times Hourly Rates
Richard Saslow Bruce Sendek	101.80	x $90/hr = $9,162.00
Dorien Kelly	14.00	1.40 hrs @ $40/hr + 12.60 hrs @ $60/hr $812.00
M. Lucile Giddings (paralegal)	1.00	x $40/hr = $40.00
Dennis Egan	0.8	x $90/hr = $72.00

Attorney: IUDITH MAGID

ATTORNEY'S FEES:

	Hours Claimed	Reduced 6.5% Per Stip.	Times Hourly Rate	Risk Enhancement
Litigation Phase I (Through 1/28/83)	304.75	284.94	x $120/hr = $34,192.80	x 1.3 = $44,450.64
Litigation Phase II (Through 6/14/84)	596.90	558.10	x $120/hr = $66,972.00	x 1.15 = $77,017.80
Litigation Phase III (After 6/14/84)	170.20	159.14	x $120/hr = $19,096.80	x 1.0 = $19,096.80
Hours Reported In Original Fee Petition Devoted to the Fee Petition	6.25	5.84	x $90/hr = $525.60	x 1.0 = $525.60
Supplemental Filings for Hours on the Fee Petition	0	0	0	0
TOTAL ATTORNEY'S FEES	1,078.10	1,008.02	$120,787:20	$141,090.84
COSTS:			$ 995.73	$ 995.73
TOTAL ATTORNEY'S FEES AND COSTS			$121,782.93 Without Risk Enhancement	$142,086.57 With Risk Enhancement

Attorney: THOMAS LOEB

ATTORNEY'S FEES:

	Hours Claimed	Reduced 6.5% Per Stip.	Times Hourly Rate	Risk Enhancement
Litigation Phase I (Through 1/28/83)	239.10	223.56	x $110/hr = $24,591.60	x 1.3 = $31,969.08
Litigation Phase II (Through 6/14/84)	172.20	161.01	x $110/hr = $17,711.10	x 1.15 = $20,367.77
Litigation Phase III (After 6/14/84)	77.35	72.32	x $110/hr = $7,955.20	x 1.0 = $7,955.20
Hours Reported in Original Fee Petition Devoted to the Petition Itself	8.6	8.04	x $90/hr = $723.60	x 1.0 = $723.60
Supplemental Filings for Hours on the Fee Petition	56.95	Recommended Reduction 53.95	x 90/hr = $4,855.50	x 1.0 $4,855.50
TOTAL ATTORNEY'S FEES	554.20	518.88	$55,837.00	$65,871.15
COSTS:			$ -0-	$ -0-
TOTAL ATTORNEY'S FEES AND COSTS			$55,837.00 Without Risk Enhancement	$65,871.15 With Risk Enhancement

Attorney: MICHAEL BARNHART

ATTORNEY'S FEES:

	Hours Claimed	Reduced 6.5% Per Stip.	Times Hourly Rate	Risk Enhancement
Litigation Phase I (Through 1/28/83)	11.50	10.75	x $110/hr = $1,182.50	x 1.3 = $1,537.25
Litigation Phase II (Through 6/14/84)	244.40	228.51	x $110/hr = $25,136.10	x 1.15 = $28,906.52
Litigation Phase III (After 6/14/84)	120.40	112.57	x $110/hr = $12,382.70	x 1.0 = $12,382.70
Hours Reported in Original Fee Petition Devoted to Petition Itself	12.0	11.22	x $90/hr = $1,009.80	x 1.0 = $1,009.80
Supplemental Filings for Hours on the Fee Petition	205.4	Recommended Reduction 193.40	x $90/hr = $17,406.00	x 1.0 = $17,406.00
TOTAL ATTORNEY'S FEES	593.70	556.45	$57,117.10	$61,242.27
COSTS:			$ 612.60	$ 612.60
TOTAL ATTORNEY'S FEES AND COSTS			$57,729.70 Without Risk Enhancement	$61,854.87 With Risk Enhancement

Attorney: PATRICIA STREETER

ATTORNEY'S FEES;

	Hours Claimed	Reduced 6.5% Per Stip.	Times Hourly Rate	Risk Enhancement
Litigation Phase I (Through 1/28/83)	61.50	x .935 = 57.50	x $95/hr = $5,462.50	x 1.3 = $7,101.25
Litigation Phase II (Through 6/14/84)	523.20	x .935 = x 489.19	$95/hr = $46,473.05	x 1.15 = $53,444.01
Litigation Phase III (After 6/14/84)	x .935 = 276.15	258.20	x $95/hr = $24,529.00	x 1.0 = $24,529.00
Hours Reported in Original Fee Petition Devoted to Petition Itself	24.0	x .935 = 22.44	x $90/hr = $2,019.60	x 1.0 = $2,019.60
Supplemental Filings for Hours on the Fee Petition	349.0	Recommended Reduction 341.60	x$90/hr = $30,744.00	x 1.0 = $30,744.00
TOTAL ATTORNEY'S FEES	1,233.85	1,168.93	$109,228.15	$117,837.86
COSTS:			$ 1,434.92	$ 1,434.92
TOTAL ATTORNEY'S FEES AND COSTS			$110,663.07 Without Risk Enhancement	$119,271.78 With Risk Enhancement

D. Interest:

It is further recommended that interest as provided in 28 U.S.C. § 1961(a) be allowed on this award of fees and costs from the date of the Court's order.

Objections and Notice of Filing:

This Special Master's Report is being filed with the Clerk of the Court on this 24th day of September 1986. Objections to this Special Master's Report and Recommendation shall be made within ten (10) days of service of this notice of filing and the Report and Recommendation by filing with the Clerk of this Court and by serving a copy on the other parties. Pursuant to Fed. R. Civ. P. 53(e) (2) application to the Court must be made for action upon this Report and Recommendation, and any objections shall be by motion and notice as prescribed in Fed. R. Civ.P. 6(d).

STEVEN D. PEPE
UNITED STATES MAGISTRATE

Dated: September 24, 1986
Ann Arbor, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, *et al,*

Plaintiffs,

v

No. 80-CV-73581
Hon. John Feikens

PERRY JOHNSON, *et al,*

Defendants.
_____/

ORDER REGARDING MONITORING FEES

The Plaintiffs' have filed a motion for monitoring fees and costs which shall be resolved as to attorneys Patricia A. Streeter and Michael Barnhart in the following amounts:

	Attorney Time	Costs	Total
Michael Barnhart	$ 28,072.00	$ 792.38	$28,864.00
Patricia Streeter	$ 34,276.95	$3,947.29	$38,224.00

These amounts are based upon the following provisions which shall also apply to future monitoring requests, which shall be billable semi-annually:

1. Hourly Rate: $110 for Michael Barnhart
   $ 95 for Patricia Streeter

2. USA Hours: There will be no reduction of hours expended amicus in *USA v. Michigan.*

3. Duplication: There will be no reduction for duplication for attorney time, provided that counsel continue to divide responsibilities.

4. Travel Time: Travel time will be billed at the stated hourly rate.

5. Costs

a. Mileage: There will be no billing for mileage where travel time has been billed;

b. Photocopies: Photocopies will be paid at a rate of $.10 per copy.

c. Office Supplies: No amounts will be requested for costs attributable to office supplies.

Future billings shall be itemized to describe hours and costs. Defendants shall have fifteen (15) days to object to documentation of hours or costs. For any objections that cannot be resolved within thirty (30) days after billing, an immediate hearing shall be requested. If no objections are made, payment shall be made within sixty (60) days of billing.

IT IS SO ORDERED.

Date: Nov. 19, 1987

John Feikens
District Court Judge

APPROVED AS TO FORM
AND SUBSTANCE:

ELAINE B. FISCHHOFF
Attorney for Defendants

PATRICIA A. STREETER
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, et al,

Plaintiffs, File No. 80-CV-73581-DT
HONORABLE JOHN FEIKENS

v

PERRY M. JOHNSON, et al,

Defendants.
_____/

STIPULATION

The parties, through their respective counsel hereby stipulate and agree:

1. Presently pending before this Court is Plaintiffs' Motion for Attorney Fees and Costs.

2. As indicated in the attached letter dated April 17, 1992 from Susan Przekop-Shaw to Patricia Streeter and Michael Barnhart, all issues raised by Patricia Streeter and Michael Barnhart in this Motion have been resolved in the manner described in the letter. Accordingly, the parties request that the Motion be dismissed.

3. Two of the matters agreed upon in the April 17, 1992 letter require a modification of the Order Regarding Monitoring Fees dated November 19, 1987, attached hereto.

4. The parties request that this Court enter the attached proposed Amended Order Regarding Attorney Fees and Costs.

Date: April 22, 1992

MICHAEL BARNHART

PATRICIA STREETER
Counsel for Plaintiffs

/88/8801698/STIP2

Date: April 17, 1992

SUSAN PRZEKOP-SHAW
Assistant Attorney General
Counsel for Defendants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, et al,

Plaintiffs, File No. 80-CV-73581-DT

v HONORABLE JOHN FEIKENS

PERRY M. JOHNSON, et al,

Defendants.
_____/

AMENDED ORDER REGARDING
ATTORNEY FEES AND COSTS

This Court entered an Order Regarding Monitoring Fees on November 19, 1987. The parties have stipulated that they wish to amend that portion of the November 19, 1987 Order that addresses future fees and costs. Having reviewed the stipulation of the parties,

IT IS ORDERED that the hourly rate for Michael Barnhart shall be $150.00 per hour, effective January 1, 1992. The hourly rate for Patricia Streeter shall be $135.00 per hour, effective January 1, 1992. However, the parties have reserved the decision as to the applicable hourly rate for time expended prior to January 1, 1992 on certain issues deferred by the parties, until such time as they are raised to the Court.

IT IS FURTHER ORDERED that billings shall be submitted semi-annually and shall be itemized to describe hours and costs. Defendants shall have fifteen (15) days to object to Plaintiffs' billings. Plaintiffs shall file a motion with the Court within thirty (30) days of receipt of Defendants' objections. Failure to file within said thirty (30) days shall constitute a waiver of any challenge to the objections. If no objections are made, payment shall be made within Sixty (60) days of billing.

Date: April 24, 1992

HONORABLE JOHN FEIKENS
UNITED STATES DISTRICT
JUDGE

APPROVED AS TO FORM
AND SUBSTANCE:

SUSAN PRZEKOP-SHAW
Assistant Attorney General
Counsel for Defendants

MICHAEL BARNHART
Counsel for Plaintiffs

PATRICIA STREETER
Counsel for Plaintiffs

88/8801689/ORDER2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, *et al.*,

Plaintiffs,

v.

Case No. 80-CV-73481
Hon. John Feikens

PERRY JOHNSON, *et al.*,

Defendants.
_____/

OPINION AND ORDER

Before me are the petitions for fees and costs of attorneys Michael Barnhart, Patricia Streeter, Deborah LaBelle and Neal Bush for services rendered to the plaintiff class.

I note that defendant State paid Mr. Barnhart $117,062.50 and Ms. Streeter $65,553.31 for work done as monitors for the second half of 1992.

Mr. Barnhart seeks an additional $16,847.50 in costs and fees. This represents 125.65 hours of work to be paid at the rate of $150 per hour, together with facsimile costs of $125. Only 49.4 of these hours relate to work performed in the period of July to December, 1992. The remaining 76.25 hours and the costs relate to work performed from July, 1990 through June, 1992. The parties agreed to defer disputes over these older fees and costs until now.

Defendants object to paying any of these costs and fees for a variety of reasons. In particular, they object to paying Mr. Barnhart for any time he spent conferring with Deborah LaBelle, Neal Bush, Sandra Girard and/or Elizabeth Alexander. Ms. LaBelle and Mr. Bush, both attorneys, have provided some legal services to the plaintiff class at the request of Mr. Barnhart and Ms. Streeter. Sandra Girard is the Director of Prison Legal Services. Elizabeth Alexander is an attorney assisting plaintiffs in their role as amicus in *United*

States v. Johnson, before Judge Enslen in the Western District of Michigan. Ms. Alexander is primarily responsible for mental health issues.

Defendants also object to time Mr. Barnhart spent addressing prisoner transfer and college programming issues. They argue that prisoners do not have a right to avoid transfer to another facility, and that college programming is not an issue in this case.

Ms. Streeter seeks an additional $1,613.44 in costs and fees to which defendants object. This represents 11.75 hours of work at the rate of $135 per hour, and $27.19[1] in telephone costs. Only 3.25 hours are from the current billing period, June through December, 1992. The remaining 8.5 hours and the telephone costs were previously deferred. Defendants object to all of these hours for reasons similar to those stated for Mr. Barnhart.

Both Deborah LaBelle and Neal Bush submit petitions for attorney fees for the first time. As noted, these attorneys became involved with the case at the request of Barnhart and Streeter. I was not consulted. Ms. LaBelle has concentrated her efforts in two areas of this litigation, out-of-cell activities and the SDT break-up process. Mr. Bush has taken the lead in the C. "Pepper" Moore retaliation dispute. His other involvement with the case has been sporadic.

Ms. LaBelle seeks $26,565 in fees, representing 177.1 hours of work at the rate of $150 per hour. Roughly half of this time (87.45 hours) involves work from July, 1992 through June, 1992. The remaining 89.65 hours are for work performed in the second half of 1992.

Mr. Bush asks for $21,144.30. $13,950 of this amount, representing 93 hours of work, is for the time spent on the

[1] This figure is in error. One phone call made on 12/12/91 ($7.50) as billed twice. The total should be $19.69, making the corrected grand total only $1,605.94.

Pepper Moore retaliation issue.[2] Although plaintiffs agreed to defer resolution of this portion of the fee dispute until the retaliation claim is resolved, I prefer to address it at this time. Of the remaining time logged by Mr. Bush, 46.3 hours represent work performed before July, 1992. Only .8 hour represents work performed in the last half of 1992. Mr. Bush asks for compensation at the rate of $150 per hour. He also seeks $129.30 for photocopying costs.

Defendants object to payment of any fees to either LaBelle or Bush (with the possible exception of hours spent on the Pepper Moore contempt motion), for the reason that their services are duplicative and unnecessary. Defendants believe that only two attorneys are needed for fair and adequate representation of the plaintiff class. They also argue that fewer attorneys are needed now than before, because the case is in a monitoring phase.

I am sympathetic to the defendants' argument that only two attorneys are needed for the plaintiff class. However, I do not agree that all of the work performed by Ms. LaBelle and Mr. Bush is duplicative or unnecessary. Furthermore, I believe it would be unfair to refuse payment simply because my permission was not secured before these attorneys became involved in the case. Although I have the power and responsibility to approve or disapprove of attorneys designated to represent plaintiffs in a class action, I believe all parties -- plaintiffs, defendants and the court -- must take some responsibility for addressing the question of the need for additional attorneys before Bush and LaBelle logged a significant number of hours.

However, if in the future plaintiffs believe the services of attorneys other than Barnhart and Streeter are needed, prior approval from the court for such activity must be secured. My

[2] The exhibit attached to Plaintiff's Reply Brief in Support of Plaintiffs' Petition for Attorney Fees and Costs incorrectly includes two entries representing work related to the Pepper Moore issue. These entries are dated 04/02/91 and 05/07/91, and are for 1.2 and 1.0 hours respectively. As a result of this error, some of the figures quoted in plaintiffs' briefs are incorrect.

approval will be conditioned on demonstrated need for additional counsel, both as to hours required and the nature of the work to be performed.

I now take up the individual fee requests. Michael Barnhart should be paid for his involvement in prisoner transfer and college programming issues. These pursuits are sufficiently related to the central *Hadix* dispute to warrant compensation. Furthermore, he should receive payment for some, but not all, of his consultations with Deborah LaBelle, Neal Bush and Sandra Girard.

I do not require defendants to pay Mr. Barnhart for his consultations with Elizabeth Alexander. However, I note that Judge Enslen of the Western District of Michigan has indicated that he will entertain a petition for attorney fees from the plaintiff class. Because Ms. Alexander's association with the case deals exclusively with the mental health issues, which are being addressed by Judge Enslen in *United States v Johnson*, I do not believe Barnhart's discussions with her are directly related to *Hadix*. Mr. Barnhart's facsimile costs are also associated with Ms. Alexander's role in *United States v. Johnson*, and should not be paid.[3]

In addition, I do not require defendants to compensate Mr. Barnhart for his consultations with Ms. LaBelle on the SDT/break-up process. Because the process is primarily controlled by the SDC committee, I do not believe that the involvement of two attorneys is needed. However, he must be compensated for his consultations with Ms. LaBelle on out-of-cell activities. His consultations with Neal Bush and Sandra Girard are also compensable.

Finally, I note that Mr. Barnhart seeks an hourly rate of $150 for all of these disputed hours. However, before January 1, 1992 Mr. Barnhart was paid at the rate of only $110 per hour. All hours logged before January 1, 1992 for which I order

[3] I note that in the past defendants have paid plaintiff's attorneys for their work as amicus in *United States v. Johnson*. In the future all fees associated with that case should be addressed to Judge Enslen.

payment should be paid at $110 per hour. Only 1992 hours should be compensated at $150 per hour. A detailed list of the hours for which Mr. Barnhart should be paid is attached to this opinion as Appendix A [text of Appendix omitted]. He is entitled to a total of $8,370.50.

The number of disputed hours involving Ms. Streeter is relatively few. As with Mr. Barnhart, she should not be compensated for time spent communicating with Elizabeth Alexander. All other hours must be compensated. Ms. Streeter's rate of pay for pre-1992 work should be $95 per hour, and for 1992 work, $110 per hour. *See* Appendix B [text of Appendix omitted] for a detailed list of hours and costs to be paid. She is entitled to a total of $734.69.

Ms. LaBelle should be compensated for her involvement in out- of-cell activities, but not for the SDT and the break-up process. Her rate of pay should correspond to the rate she receives for her work in *Glover v Johnson*.. For work performed since January, 1992 she should receive $150 per hour. Or work prior to that date, she should receive $135 per hour. *See* Appendix B [text of Appendix omitted] for a detailed list of the hours for which Ms. LaBelle should be paid. She is entitled to a total of $10,929.00.

Finally, I address Mr. Bush's fee request. Although the Pepper Moore dispute is not fully resolved, I believe plaintiffs are entitled to attorneys fees for this portion of the litigation. The issue of retaliation is significant, and an appropriate area of concern for the plaintiff class. Consequently, Mr. Bush should be paid for all hours logged in the Pepper Moore dispute.

Furthermore, I find that he should be compensated at the same rate of pay as Mr. Barnhart because of his role as lead counsel in this portion of the case. Mr. Bush spent 43 hours before 1992 working on this issue and 50 hours during 1992. He should be paid $110 per hour for the pre-1992 work ($4,730), and $150 per hour for work performed in 1992 ($7,500).

Mr. Bush also seeks compensation for work in other areas of this case. Most of these hours should not be

compensated, because I find his assistance was not needed. He did, however, make a contribution during September of 1990 when he was called upon to step in for Mr. Barnhart and Ms. Streeter. Actions taken by defendants regarding Jackson Community College programming required a quick response from plaintiffs' counsel. In particular, I refer to time entries dated 09/13/90 for 2.4 hours, 09/23/90 for 2 hours, 09/24/90 for 2 hours, and 09/25/90 for 11.5 hours. Mr. Bush should be compensated for exactly half of the time he spent on these activities, a total of 8.95 hours. This should be paid at the rate of $110 per hour, for a total of $984.50. Mr. Bush should also be compensated for $129.30 in photocopying costs.

The grand total for Mr. Bush, including Pepper Moore retaliation, costs, and other compensable work is $13,343.80.

I emphasize again that in the future any work done on behalf of the plaintiff class by attorneys other than Patricia Streeter and Michael Barnhart must be pre-approved by this Court.

IT IS SO ORDERED.

JOHN FEIKENS
UNITED STATES
DISTRICT JUDGE

Dated: June 14, '93

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, *et al.*,

Plaintiffs,

v.

PERRY M. JOHNSON, *et al.*,

Defendants.
_____/

Civil Action No.
80-73581
Hon. John Feikens

OPINION AND ORDER REGARDING
PLAINTIFFS' MOTION FOR ATTORNEY FEE

Attorneys for the plaintiff class have petitioned for an award of attorneys fees for the period of July 1, 1995 through December 31,1995. Defendants initially object to the payment of the fees, claiming that the Prison Litigation Reform Act of 1995 ("the Act" or "PLRA"), which became effective April 26, 1996, is retroactive in its application to attorney fees in cases such as this. Attorneys for the plaintiff class contend in opposition that that Act is not retroactive, is prospective, and does not, therefore, affect the petition for fees in the period covered.

It is necessary for me, therefore, to make a determination whether that Act has retroactive application to attorney fees.

The intent of Congress for the application of the attorney fees provision of PLRA is not clear. Plaintiff class argues that Congress intended prospective application of the attorney fees provisions of the PLRA since only one of the ten sections of PLRA explicitly provides for its application to pending cases. As evidence, they assert that the attorney fees provisions were included in the section applying to pending cases when the bill was passed by the House of Representatives, but transferred to another section before the bill was signed into law. Plaintiff

class' inference does not constitute a plain showing of congressional intent.

If a statute were to operate retroactively, there is a presumption that it does not govern absent congressional intent favoring such a result. *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1505 (1994). To determine whether a statute operates retroactively,

> The court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Landgraf, 114 S. Ct. at 1499.

Defendants first allege that PLRA requires that the plaintiffs' class attorneys return $12,339.38 for fees paid to them for the period from July 1,1995 through December 31, 1995. This figure represents the difference between what the plaintiffs' class attorneys were paid pursuant to this court's order and what the defendants calculate the PLRA's limit on payments to be. Such a requirement clearly imposes a significant intrusion into the working relationship of both parties as settled by this court's order. If defendants are entitled to a return of fees already paid, they should be entitled to restitution for all fees paid dating back for years in excess of $112.50 per hour. This result is not intended by the statute.

This statute also does not apply to the fees in question that have not been paid. If it did, it would modify the negotiated agreement between the parties in regard to payment for services. Both parties have been working for almost ten years according to the settled orders of this court both for the payment of fees and also for the monitoring of fees. Application of this law would have a retroactive effect in its disruption of the established expectations of the parties, and

again there is no evidence of statutory intent to affect that arrangement.

The essence of the defendants' contention is that a grant of attorneys' fees is prospective in nature and does not affect the substantive rights of the parties. The awarding of fees to a prevailing party, however, does not present the same issues as the taking away of fees from a prevailing party because of a recently- passed statute. In this case, work has been done and fees have been paid pursuant to the orders of this court for almost a decade. Thus the application of PLRA is not prospective in nature because it takes away fees already earned, which would in turn adversely affect the substantive rights of the plaintiff class. The cases cited by the defendants are therefore inapposite to the issues presented by application of PLRA to this case.

Having determined that the Prison Litigation Reform Act of 1995 is not retroactive in its application and, therefore, does not affect attorney fees generated and presented for the period of July 1, 1995 through December 31, 1995, I must now determine what fees are to be paid.

Multiple briefs have been filed and a hearing was held on May 7, 1996 on the fee petitions. I note that they relate to legal services both of Michael Barnhart and Deborah LaBelle, plaintiffs' class counsel.

Michael Barnhart submitted a statement for fees for the period of July 1, 1995 through December 31, 1995 which sets out a detailed billing as to 349.90 hours. Deborah LaBelle submitted a statement for fees for the same period which sets out a detailed billing as to 124.15 hours.

Defendants initially objected to plaintiffs' class counsel's hours for time spent on defendants' appeal of my Opinion and Order denying modification of the Consent Decree, totaling 252.55 hours. Defendants claim these hours are excessive. These hours were then reduced by plaintiffs' class counsel.

Defendants still object to the payment of 100 hours of work that Deborah LaBelle performed in appellate work on

the case, and to the payment of 45 hours of appellate work performed by Michael Barnhart. Barnhart has now waived payment of 27.6 hours relating to his work on appeal to the Sixth Circuit. What remains for decision is the petition for payment of 100 hours in the amount of $15,000.00 to Deborah LaBelle and $2,610.00 in payment of 17.4 hours to Michael Barnhart for their work on this appeal.[1]

This case, over many years, has been before this court and the Sixth Circuit repeatedly. One major problem is the continued shift in counsel in the office of Michigan's Attorney General. In its representation of defendant Department of Corrections, over time, many lawyers in the Attorney General's Office have represented the defendants: Elaine Fischhoff, Thomas Nelson, Brian Mackenzie, Susan Harris, Barbara Schmidt, Susan Przekop-Shaw, Kim Harris and now Lisa Ward.

Undoubtedly their need to learn anew the complex issues in this case increased not only the amount of time that was required to be applied by plaintiffs' class counsel and by me, but it also has diminished the cooperative spirit which marked the relationships between earlier counsel and counsel now involved.

Central to the work that was done on the appeal, and to which most of the present controversy over fees is related, was a remand by the Sixth Circuit to this court to consider the applicability of the U.S. Supreme Court decision in 1992 of *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748. It was at this court's suggestion that the parties agreed to request a remand, which the Sixth Circuit granted; and thereafter the parties and I engaged in extensive negotiation efforts which, unhappily, did not succeed. I then issued an Opinion and Order and when the case was again submitted to the Sixth Circuit, it required additional briefing analysis.

I find that the petitions for payment of fees to Deborah

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[1] All reconstructed hours billed by plaintiffs' class counsel have been paid except for these hours.

LaBelle of 100 hours, and to Michael Barnhart of 17.4 hours, are reasonable. Defendants' motion for modification of the Consent Decree was submitted before the *Rufo* decision. When defendants appealed my initial Opinion and Order, the case had to be briefed and argued. While the appellate decision was pending, the *Rufo* decision came down and the remand followed so that I could reconsider my ruling. When I did so, and defendants again appealed my second Opinion, further appellate work by plaintiffs' class counsel was required.

Plaintiffs' class counsel's petitions, as modified, are therefore GRANTED; and defendants are ordered to pay $15,000.00 forthwith to Deborah LaBelle and $2,610.00 forthwith to Michael Barnhart.

IT IS SO ORDERED.

John Feikens
United States District Judge

Dated: May 30, 1996

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Everett Hadix, *et al.*,
Plaintiffs-Appellees,
Nos. 96-1851/1907/1908/1943

v.

Perry M. Johnson, *et al.*,
Defendants-Appellants
(96-1851/1908/1943),

United States of America,
Intervenor (96-1908/1943).

United States of America,
Plaintiff-Appellee,

v.

State of Michigan, et al.,
Defendants-Appellants
(96-1907).

Appeal from the United States District Court
for the Eastern and Western Districts of Michigan
at Detroit, Grand Rapids, and Kalamazoo.

Nos. 80-73581; 84-00063; 92-00110--John Feikens, District Judge, Richard A.Enslen, Chief District Judge.

Argued: February 4, 1997

Decided and Filed: May 20, 1998

Before: MARTIN, Chief Judge; NORRIS and MOORE, Circuit Judges.

MOORE, J., delivered the opinion of the court, in which MARTIN, C. J., joined. NORRIS, J. (pp. 47-51), delivered a separate opinion concurring in part and dissenting in part.

OPINION

KAREN NELSON MOORE, Circuit Judge. We are called upon in this appeal to perform the delicate task of determining whether Congress unconstitutionally encroached into matters reserved for the Judiciary in enacting the automatic stay provision of the Prison Litigation Reform Act ("PLRA" or "Act"), Pub. L. No. 104-134, 110 Stat. 1321-66 (1996), as amended by the Department of the Judiciary Appropriations Act of 1998, Pub. L. No. 105-119, 123, 111 Stat. 2440, 2470 (1997). 18 U.S.C. § 3626(e) (as amended in 1997). Under the PLRA, the filing of a motion to terminate a prison conditions consent decree triggers an automatic stay of all prospective relief under the decree on the thirtieth day after the filing of the motion, or the ninetieth day after the filing should the court postpone the effective date of the automatic stay by sixty days for good cause. See 18 U.S.C. § 3626(e)(2)-(3) (as amended in 1997). The automatic stay remains effective until the court rules on the termination motion. See 18 U.S.C. § 3626(e)(2).

In these consolidated cases the Michigan Department of Corrections moved to terminate longstanding consent decrees and sought to have prospective relief under the decrees automatically stayed pending resolution of the motions. The district courts invalidated the PLRA automatic stay provision on separation-of-powers and due process grounds. During the pendency of this appeal, Congress enacted Pub. L. No. 105-119, 123, 111 Stat. 2440, 2470 (1997), which amended the PLRA's automatic stay provision. The prisoners and the Department of Justice argue that under the amended statute Congress implicitly recognizes the inherent power of the courts to suspend the automatic stay in accordance with generally applicable equity standards, an interpretation with which the state officials disagree.

We believe the state officials' construction of the PLRA's automatic stay provision violates the separation-of-powers doctrine because under their interpretation, the automatic stay amounts to a direct legislative suspension of a judicial order and, alternatively, intrudes impermissibly into the effective functioning of the Judiciary under certain circumstances. In contrast, the reasonable construction espoused by the prisoners and the Department of Justice does not violate separation-of-powers principles. Accordingly, we hold that the PLRA automatic stay provision, as construed to permit the courts to exercise their inherent equitable powers, does not give rise to an unconstitutional incursion by Congress into the powers reserved for the Judiciary. The parties also raise several other issues that we address below, including whether the attorney fees provisions of the PLRA should apply retroactively to pre-enactment conduct.

* * *

IV. RETROACTIVITY OF ATTORNEY FEES PROVISION

We now turn to the award of attorney fees entered in the Hadix litigation by Judge Feikens on May 30, 1996. See J.A. #96-1851 at 464-69. What would have amounted to a rather commonplace judicial ruling on disputed attorney hours in an ongoing litigation has been complicated by its unfortunate timing. The inmates' entitlement to attorney monitoring fees and procedures for payment was established in the Hadix litigation in 1987. See J.A. #96-1851 at 165-66. Pursuant to prescribed procedure, in early 1996 the inmates submitted to the state officials petitions for attorney fees covering the period of July through December 1995. The state officials objected to certain hours, and the parties could not resolve the dispute by themselves. The inmates therefore filed a motion for attorney fees with the court on March 12, 1996. J.A. #96-1851 at 277-78. The motion, entirely for fees incurred in the latter half of 1995, was pending before the district judge on April 26, 1996, when the PLRA took effect.

Section 803(d) of the PLRA amended the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997, *et seq.*, as it applied to awards of attorney fees. Prior to the

passage of the PLRA, courts were authorized under 42 U.S.C. § 1988 to award attorney fees in this type of prison reform litigation based on the community's market rate for the services rendered. See *Hadix v. Johnson*, 65 F.3d 532, 536 (6th Cir. 1995); *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989). Section 803(d) of the PLRA, however, limits attorney fees authorized in prison litigation to an amount "directly and reasonably incurred in proving an actual violation of the plaintiff's rights" and proportional to or directly and reasonably incurred in enforcing the court-ordered relief. See 42 U.S.C. § 1997e(d).[18] In addition, the rate upon which the award is based may not exceed 150 percent of the hourly rate

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[18] Section 1997e of Title 42, as amended by the PLRA, provides in relevant part:

> (d) Attorney's Fees
>
> (1) In any action brought by a prisoner . . . in which attorney's fees are authorized under [42 U.S.C. 1988], such fees shall not be awarded, except to the extent that
>
> > (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under [42 U.S.C. 1988]; and
> >
> > (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
> >
> > (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

established under 18 U.S.C. § 3006A.[19] The 1995 established rate of pay in the *Hadix* litigation was $150 per hour. See J.A. #96-1851 at 174, 392. Though the parties do not agree on how the PLRA would affect the rate of pay in

this case, we assume, for illustrative purposes only, that the PLRA would cap the maximum hourly rate for attorney fees in this case at $112.50 (150% of $75 maximum hourly rate).[20] See 42 U.S.C. § 1997e(d)(3).

Seeking to take advantage of the lesser rate and more stringent standard, the state officials asked the district court to apply the PLRA's attorney fees provisions to the pending motion, arguing that the PLRA applies to all "awards" entered after the enactment date, April 26, 1996, regardless of when the fees were actually earned. Upon consideration, the district court denied application of the PLRA to the fees earned in 1995 and directed payment at the pre-established rate of $150 per hour. J.A. #96-1851 at 464-69. Before us the state officials renew their arguments and ask us to hold that the PLRA's new attorney fees limitations apply to legal work completed prior to the passage of the PLRA. We decline their invitation.

We recently addressed the retroactivity of the PLRA's attorney fee provisions to legal work performed before its enactment, and held "that allowing the PLRA's limitations on attorney fees to alter the standards and rate for awarding fees

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[19] Section 1997e of Title 42, as amended by the PLRA, provides in relevant part:

> (d) Attorney's Fees . . .
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under [18 U.S.C. 3006A], for payment of court-appointed counsel.

[20] As we hold the PLRA's attorney fees provisions inapplicable to the fee award underlying this appeal, we have no occasion to resolve what would be the hourly rate in this case under the PLRA.

for legal work competed prior to passage of the PLRA results in an impermissible retroactive effect by attaching significant new legal burdens to the completed work, and by impairing rights acquired under preexisting law." *Glover v. Johnson*, ___ F.3d __, 1998 WL 83102, at * 23 (6th Cir. March 2, 1998). Accordingly, we hold that the award of attorney fees for legal work performed prior to the enactment of the PLRA is governed by 42 U.S.C. § 1988, and not § 803(d) of the PLRA.

As for the propriety of any given fee award, provided the district court explains its reasoning in a clear and concise manner, an award of attorney fees under 42 U.S.C. § 1988 "is entitled to substantial deference." *Hadix*, 65 F.3d at 534-35; see also *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). "Accordingly, we review a district court's award of attorney fees, including the fee rate, only for abuse of discretion." *Hadix*, 65 F.3d at 534. The state officials assert that some of the hours to prepare an appellate brief were excessive, duplicative, and thus unreasonable.[21] The contested brief was prepared for an appeal to this court of a district court order refusing to modify the out-of-cell activity plan and mandating college programming following *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). Judge Feikens, who was intimately aware of the work being performed by the attorneys, of the prior history of the case, and of the need to revisit the modification request following Rufo, found the hours at issue to be reasonable for the composition of a complex appellate brief. See J.A. #96-1851 at 464-69 (Op. and Order Regarding Pls.' Mot. for Att'y Fees). Our primary concern is that the fee awarded was reasonable, and we are satisfied that it was. See *Hadix*, 65 F.3d at 535; *cf. Northcross v. Board of Educ. of Memphis City Schs.*, 611 F.2d 624, 640-42 (6th Cir. 1979) (discussing reasonableness of attorney fees award for large school desegregation case),

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[21] On appeal the state officials object to 100 hours for Deborah LaBelle and 17.4 hours for Michael Barnhart. See J.A. #96-1851 at 287-304 for itemization of hours.

cert. denied, 447 U.S. 911 (1980). Not having been persuaded that the district court's reasonableness finding was erroneous,

we affirm the district court's May 30, 1996 order awarding attorney fees.

* * *

VI. CONCLUSION

We conclude that the 1997 amendments to the automatic stay provision, as properly construed to avoid constitutional infirmity, do not interfere with the traditional inherent powers of the courts. Since the lower courts retain the power to suspend the automatic stay in accordance with the traditional standards governing the granting of preliminary injunctions in equity, we REVERSE the lower court orders holding the pre-1997 automatic stay provision unconstitutional. We also AFFIRM the May 30, 1996 award of attorney fees entered in the *Hadix* litigation by Judge Feikens, and we AFFIRM Judge Enslen's decision to retain jurisdiction over the security classification system at the Michigan Reformatory. We REMAND for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, *et al.*,

Plaintiffs, Civil Action No. 77-71229

v.

PERRY JOHNSON, Director, Michigan Department of Corrections, *et al.*

Defendants.
_____/

OPINION GRANTING
AWARD OF ATTORNEY FEES

The attorneys for plaintiffs have petitioned the court for an award of fees in the amount of $108,315.00 and of costs in the amount of $2,227.19 pursuant to 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Awards Act of 1976. This Act states, in part, that:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Background.

Mary Glover is one of a group of named plaintiffs who represented a class of approximately 400 women prisoners in this action. In a case of first impression, the women challenged the policies and procedures practiced by the Michigan Department of Corrections as constituting discriminatory treatment against women who were incarcerated under state law. The case was unable to be resolved before trial,

although lengthy settlement negotiations took place, and ten days were necessary in which to take testimony. In an opinion issued October 17, 1979, I found that the rehabilitation opportunities available to the State's women prisoners were substantially inferior to those available to the State's male prisoners; that implementation of a legal studies course was necessary to guarantee the women inmates' right of access to the courts; and that the use of Kalamazoo County Jail for housing female prisoners was described by state statute and regulation. On October 26, 1979, I entered an order setting forth in general terms the remedies that the State would be required to implement and requiring it to submit for court approval its remedial plan. The plan itself resulted in lengthy negotiations and I entered a final order on April 6, 1981, incorporating the provisions of various interim orders, and providing, in part, for an associate degree program, apprenticeships, prison industries, paralegal training programs, and off-grounds privileges, that would put the women prisoners on parity with the men.

Determination

An award of attorney's fees is proper in this case since plaintiffs prevailed. Congress intended that plaintiffs with meritorious claims which "further an important public interest but do not result in an award of damages from which attorney's fees can be paid, are not discouraged from bringing suit because of the prospect of having to pay their own attorney's fees." *Martin v. Hancock*, 466 F. Supp. 454 (D.Minn. 1979).

Defendants argue that plaintiffs did not prevail on all claims put before me in this complex litigation. They particularly object to any award of attorney fees for a restraining order sought against them for harassing plaintiffs in June of 1980. Plaintiffs brought the petition for a restraining order due to a series of actions taken by the Department of Corrections that could have been construed as harassment or retaliation for the results that plaintiffs achieved through my opinion of October 17, 1979. In effect, Corrections personnel allegedly seized upon an extremely literal meaning of the phrase "equal protection" and used it so as to deny women prisoners privileges that they had theretofore enjoyed, such as

possession of small personal items, including jewelry and personal clothing. Plaintiffs additionally alleged violations of my interim order which required the transfer of inmates to Camp Pontiac (now Camp Gilman) on a voluntary, not selective basis.

Defendants argue that the restraining order constituted a prior restraint on speech in violation of the First Amendment and that since plaintiffs were never granted a preliminary injunction, although a temporary restraining order was issued, they never prevailed on the issue. However, I believe that the issues raised by the petition were, and are, of continuing concern to me, although I found it unnecessary to formally resolve them at that juncture. I do not agree that the failure to issue a formal opinion or order a preliminary or permanent injunction bars the award of attorney fees, for to do so would honor form and ignore the substance of plaintiffs' complaints.

Furthermore, attorney fees are explicitly permitted in these instances. The blueprint for the award is contained in *Northcross v. Board of Education of the Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). The court stated the rule as follows:

> The question as to whether the plaintiffs have prevailed is a preliminary determination, necessary before the statute comes into play at all. Once that issue is determined in the plaintiffs' favor, they are entitled to recover attorneys' fees for "all time reasonably spent on a matter." The fact that some of that time was spent in pursuing issues on research which was ultimately unproductive, rejected by the court, or mooted by intervening events is wholly irrelevant. So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith.

Northcross, supra, 611 F.2d at 636. Since I find that plaintiffs have prevailed in the lawsuit as a whole and since I do not find that any of the issues raised and brought before this court

were frivolous or in bad faith so as to accrue larger attorney fees, I will fully allow claims to be made on all issues in the suit.

Method of Calculation of Attorney Fees

The Civil Rights Attorney's Fees Awards Act serves two purposes. First, the opportunity to obtain competent counsel is provided to those citizens who must sue to enforce their rights, especially where the individual may not normally be able to afford a lawyer. Second, the indirect effect is as a deterrent because fee awards will encourage an individual to vindicate his civil rights in court, providing the added deterrent to the defendant by imposing a monetary burden, even where no damages are awarded. *See, Oldham v. Ehrlich*, 617 F.2d 163, 168 (8th Cir. 1980). Therefore, it is apparent that fee awards were not meant to be rewards to victorious attorneys but, taking into consideration the practicality of the work of lawyering, a way to encourage attorneys to accept civil rights cases.

The United States Court of Appeals for the Sixth Circuit has interpreted the Act through *Northcross, supra*. The rule in that case is applied by reviewing the petition for attorney fees, subtracting the hours that are duplicative or used for padding, and awarding a "reasonable" attorney fee for the balance of the hours claimed by counsel for the prevailing party.

> Particularly important to this case is the instruction that counsel for the prevailing party should be paid, "as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter." The goal to be achieved, according to the Senate Report [Senate Report No. 94-1011, reprinted in 1976 U.S. Code Cong. & Admin. News p. 5908], is to make an award of fees which is "adequate to attract competent counsel, but which do not produce windfalls to attorneys."

Northcross, supra, 611 F.2d at 633.

In this case, I am confronted by a situation that is

becoming increasingly common. Plaintiffs were represented by Judith Magid, who was employed by Wayne County Neighborhood Legal Services, and Charlene Snow, an attorney at Michigan Legal Services.[1] In instances where public interest law groups and their attorneys are involved, a simple application of *Northcross* overlooks the particular problems of applying a flat "reasonable" hourly fee that is calculated by reference to community attorneys and their "fair market value." Public interest law groups generally provide a salary for their attorneys which is almost invariably lower than competitive salaries in the communities. The groups are funded by governmental grants and private donations which additionally pay for the support personnel salaries, office rent, supplies, and provide limited litigation funds to pay expert witnesses, filing fees, and other costs of lawsuits (all of which shall hereinafter be referred to as "overhead"). Application of what may be considered a reasonable attorney fee in the community may either be insufficient to compensate the group for its overall costs or, albeit unlikely, constitute a "windfall." Thus, the precepts of *Northcross*, combined with the legislative history of the Civil Rights Attorney's Fees Act, have encouraged my fashioning of a model for the award of attorney fees to public interest law groups. Indeed, *Northcross* may be read so as to encourage such an approach.

> This does not mean that the routine hourly rate charged by attorneys is the maximum which can or should be awarded. In many cases that rate is not "reasonable," because it does not take into account special circumstances, such as unusual time constrain[sic] , or an unusually unpopular cause, which affect the market value of the services rendered. Perhaps the most significant factor in these cases which at times renders the routine hourly fee unreasonably low is the fact that the award is contingent upon success. An attorney's regular hourly billing is based upon an expectation of payment, win,

[1] Ms. Snow has since left Michigan Legal Services but has continued as counsel as a part of her private practice. I have no difficulty in applying the usual test of *Northcross* to those hours that she claims individually.

> lose or draw. If he or she will only be paid in the event of victory, those rates will be adjusted upward to compensate for the risk the attorney is accepting of not being paid at all. Some cases under the civil rights statutes, those in which the facts are strong and the law clear, pose little risk of losing, and the attorney's normal billing rate will be adequate compensation. Others, in developing areas of law or where the facts are strongly disputed, will require a substantial upward adjustment to compensate for the risk.

611 F.2d at 638.

Northcross suggests that a court should "look to the fair market value of the services provided" to calculate a reasonable hourly fee even for those attorneys "who have no private practice." 611 F.2d at 638. However, it has been suggested that legal services attorneys, and by analogy, other public interest lawyers, do not have a normal billing rate since there is no "market" for their s kills. See, *Rodriguez v. Taylor*, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). In most instances, legal services clients do not pay for the attorney's services. Sometimes a sliding scale arrangement is adopted which bills a client according to his ability to pay, but the fee generally never approaches the cost of providing the services. However, the ever present clientele who use the services could never pretend to be a "market' for the public interest attorney's services.

> The cumulative value to society, and hence the derivative value of individual attorney's time from legal services representation of the needy is substantial, albeit not easily monetized. The only fair conclusion that can be reached is that, with the present structure for the delivery of legal services, relative compensation of private firm attorneys and legal aid lawyers does not entirely reflect differences in the reasonable value of their respective professional time. Courts, in awarding attorneys' fees, are not empowered to rectify this general disparity.

> However, they may properly take account of these market disparities in fixing hourly rates for particular awards.

Rodriguez, supra, 569 F.2d at 1248. Hence, the mere definition of market value precludes a ready determination of reasonable fee for public interest lawyers.

The courts have not agreed to a method of calculation for a reasonable fee to be awarded to public interest law groups although it is well settled that fees are awardable to the groups. *See, Incarcerated Men of Allen County Jail v. Fair*, 507 F.2d 281, 286 (6th Cir. 1974) , where the court stated that, "[t]he fact that Appellees' counsel was a legal services organization, partially supported by public funds, is irrelevant in determining whether an award is proper," and cases cited therein. *See also, Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974), and *Loney v. Scurr*, 494 F. Supp. 928 (S.D. Iowa 1980), where the court rejected a unique argument by defendant that since plaintiff's attorney fees had already been paid by the state in the form of grants ultimately derived from public money, it is unjust to require the defendant to pay for the same services through an award of attorney fees. Several courts have commented that it is unfair to calculate a reasonable hourly fee on the basis of salary alone. Judge Van Dusen, in *Rodriguez*, commented that:

> Legal services salaries are generally considerably lower than salaries paid associates in private firms who have comparable experience and credentials. This salary differential need bear no relation to quality of representation, in general or in a particular case, or to the benefits received by clients. Compensation disparities usually reflect the relative poverty of legal services funding . . . Reference to absolute salary levels is about as reasonable as deriving the reasonable value of a federal judge's time from his or her salary. . . . To the extent salary levels are relevant, the appropriate referrent

> would be comparable salaries earned by private attorneys with similar experience and expertise in equivalent litigation.

Rodriguez, supra, 569 F.2d at 1248. *See also, Palmigiano v. Garrahy*, 616 F.2d 598, 602 (1st Cir. 1980), *cert. denied*, 449 U.S. 839 (1980); *Lackey v. Bowling*, 476 F. Supp. 1111, 1116-17 (N.D. Ill. 1979); *Gunther v. Iowa State Men's Reformatory*, 466 F. Supp. 367, 368-69 (N.D. Iowa 1979); *Beazer v. New York City Transit Authority*, 558 F.2d 97, 100 (2d Cir. 1977), rev'd on *other grounds*, 440 U.S. 568 (1979). One reason for the decisions appears to be that a market value fee for a private attorney includes several different factors in its calculation, including cost, overhead, and profit, in addition to the fee, that are necessary to provide representation to a client. See, *Gunther, supra*, 466 F. Supp. at 369. A list of considerations exists to assist a court in the determination of what constitutes "appropriate standards" for the determination of a reasonable fee, *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974),[2] but they were formulated with a private practitioner in mind and bear little relationship to public interest lawyers because of the differences between the two groups. Thus, this line of reasoning can be expressed as an "apples and oranges" approach. In lieu of an award of proportionate salary, some courts have concluded that a reasonable attorney fee in the community is an appropriate award to legal services groups. *Palmigiano, supra*, 616 F.2d at 601; *Reynolds v. Coomey*, 567 F.2d 1166 (1st Cir. 1978); *Dietrich v. Miller*, 494 F. Supp. 42, 44 (N.D. Ill. 1980); *Donaldson v. O'Connor*, 454 F. Supp. 311, 313-14 (N.D. Fla. 1978); *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974).

It has been suggested in several circuits that there is no

[2] These factors include the following: (1) time and labor required; (2) novelty and difficulty of the question; (3) skill required to perform the service; (4) preclusion of other employment; (5) customary fee; (6) fee agreement; (7) time limitations; (8) amount involved and results obtained; (9) experience, reputation and ability of attorney; (10) "undesirability" of case; (11) nature and length of professional relationship with client; and (12) awards in similar cases. *Johnson, supra*, 488 F.2d at 717-19.

reason to distinguish a reasonable fee for a private attorney from a reasonable fee for a public interest attorney. *Copeland v. Marshall*, 641 F.2d 880, 889 (D.C. Cir. 1980); *Palmigiano, supra*, 616 F.2d at 601-03; *Rodriguez, supra*, 569 F.2d at 1247-48; *Lackey, supra*, 476 F. Supp. at 1116-17; and *Gunther, supra*, 466 F. Supp. at 369. The reasoning in this line of cases begins with Senate Report No. 94-1011, *supra*, which states, in pertinent part:

> The appropriate standards, see *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); and *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for the prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter." *Davis, supra; Stanford Daily, supra*, at 684.

1976 U.S. Code Cong. & Admin. News at 5913. Thereafter, each court rationalizes its failure to set an independent hourly fee for public interest attorneys differently.

The court in *Copeland V. Marshall*, the most recent decision and, *de facto*, the one with the benefit of previous decisions, articulates four reasons for awarding a community rate to public interest lawyers. First, it relies on the legislative history, stating that no distinction was drawn between the private and public interest bar in the Senate Report and citing to *Davis, supra*, 8 E.P.D. at 5048-49, where awards to public interest law firms were computed in the "traditional manner." Second, it alleges that the purpose of the Civil Rights Attorney's Fees Act will be advanced by the "market value" approach. It speculates that fee awards paid by discriminators may, in fact, aid in reducing the subsidies paid from the public funds to the organization. Third, the court is

concerned that the defendant may profit by a windfall since it would be under less pressure to settle and that the deterrent purpose would be proportionately decreased. Finally, the court relies on precedent set by other judges who considered the question. It cites from the United States Supreme Court's decision in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), which agreed that Congress approved of the award of attorney fees to public interest groups in the Civil Rights Attorney's Fees Awards Act. The court grasps at the citations in the Supreme Court's decision to *Reynolds v. Coomey, supra*, and *Torres v. Sachs*, 538 F.2d 10 (2d Cir. 1976), to imply a tacit approval of its reasoning, quoting the following passage from *Torres*:

> *allowable fees and expenses may not be reduced because [the prevailing party's] attorney was employed ... by a civil rights organization or because the attorney does not exact a fee.*

(Emphasis added in *Copeland*). 538 F.2d at 13. I do not disagree with the proposition that a prevailing party's attorney fees should not be reduced merely because counsel is employed by a public interest law firm but I contend that it should be calculated differently to account for the differences between public interest attorneys and private lawyers.

The panel in *Palmigiano, supra*, argues in the same vein as *Copeland*, citing the passage from *Davis* but noting that the court in *Davis* made its own assessment of reasonable hourly rates by referring to the *Johnson* criteria. *See*, footnote 2, *supra*. The court also approved an award of "market value" fees because it would enable more civil rights litigation to be funded through an organization with finite resources, thus furthering the legislative purpose and noted that it would not consider such enrichment to constitute a windfall. This reasoning was also applied in *Lackey, supra*.

In *Rodriguez*, supra, the panel recognized the difficulty of applying a normal billing rate to attorneys salaried by publicly funded legal services organizations. It noted that private firms often calculate into their billing rates the financial stake of the firm in the contested matter, a concern not reflected by the public interest law firms who, admittedly, have no "market."

However, the court ultimately decided that to the extent salaries are relevant to consideration in the calculation of a fee, they should be compared to salaries of attorneys in the private sector with similar experience and expertise, a conclusion based on rhetoric not reasoning. On remand, the district court was requested to recalculate the fee award to reflect the value of the attorney's time with guidance that consisted principally of rejection of the previously used methods of the court -- annual salary and compensation for lawyers appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (1970).

The concern that defendants would profit from the calculation of different hourly fees for public interest and private attorneys was echoed by the court in *Gunther*, supra. In rejecting the *Page-Alsager* approach of its neighboring district, one based on a proportionate amount of the attorney's salary (see my discussion *infra*, at 17-18) , the court declared that the award under the method would be a "travesty and substantially harm future plaintiffs represented by public interest counsel in their attempts to induce settlement. 466 F. Supp. at 368-69. However, the case intimates that a more complex method of arriving at an attorney fee for a public interest group is needed, since

> compensating an organization according to its employee's salary does not take into consideration: (1) the criterion established in *Johnson*, *supra*, (2) the employer's overhead costs; and (3) salaries for other support personnel.

466 F. Supp. at 369.

I think that the "apples and oranges" approach is as simplistic as the title suggests. The Legal Services Corporations Act, 42 U.S.C. §2996 *et seq.*, provides that:

> No funds made available by the Corporation under this subchapter, either by grant or contract, may be used --
>
> (1) to provide legal assistance (except in accordance with guidelines promulgated by the Corporation) with respect to any fee-generating

> case (which guidelines shall not preclude the provision of legal assistance in cases in which a client seeks only statutory benefits and appropriate private representation is not available)

42 U.S.C. § 2996f(b) (1). The guidelines promulgated by Legal Services Corporation do not wholly prohibit fee-generating cases, but do so only where other adequate representation is available. 45 C.F.R. § 1609.3 Fees may be accepted if other representation is unavailable and a court or administrative body approves the award. 45 C.F.R. § 1609.5 The goal of the guidelines is to restrain the legal services groups from competition with private attorneys while still providing counsel where no private practitioners would accept the case. *See also, Rodriguez, supra*, 569 F.2d at 1246. However, the purposes of the Legal Services Corporations Act would be circumvented if a flat reasonable fee were awarded under the Civil Rights Attorney's Fees Awards Act since the fees in the community generally have profit incorporated in the fixed amount. That profit is not properly awarded to legal services groups is supported, in part, by an analogy to 45 C.F.R. § 1609.6:

> When a case or matter subject to this par- results in a recovery of damages, other than statutory benefits, *a recipient may accept reimbursement* from the client for *out-of-pocket costs and expenses* incurred in connection with the case or matter.

The remedy to this situation can take one of two directions. First, one can begin with a determination of a reasonable hourly fee in the community, guess the built-in profit margin, and subtract the amount of profit from the hourly fee. The second, and I believe better, alternative is to begin with the time spent by the attorney and calculate the proportionate amount of cost to the public interest law group of providing her services for the litigation. This prospective approach has the benefit of avoiding any guess work about a profit margin with the additional benefit of compensating the organizations fully for their costs, especially since they may exceed the reasonable hourly fee for junior associates in a large law firm.

I am only aware of two cases that have tacitly approved of this approach, both written by Judge Hanson, although neither case fully adopts it. In *Alsager v. District Court of Polk County, Iowa (Juvenile Division)*, 447 F. Supp. 572 (S.D. Iowa 1977), the judge awarded attorney fees to three American Civil Liberties Union ("ACLU") lawyers based on the proportion of time that they spent on the litigation and their salaries. His reasoning was:

> The ACLU has been compensated in full for the money expended on attorneys in this case, and, having money that would not otherwise be reimbursed, it can now bring other such similar actions.

447 F. Supp. at 578, *citing* to *Rodriguez v. Taylor*, 428 F. Supp. 1118 (E.D. Pa. 1976), *vacated in part*, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). Judge Hanson had an opportunity to expound upon his method in *Page v. Preisser*, 468 F. Supp. 399 (S.D. Iowa 1979) where plaintiffs were represented by a recipient of funds from the Legal Services Corporation.[3] Therein he explained:

> *Alsager* simply stated means no more than that where an organization successfully undertakes the expense of representing a civil rights plaintiff through its salaried attorneys and no part of the fee award will compensate the attorneys involved, but instead will reimburse the organization in question, "the fact that an attorney is salaried [affects] the method in determining the amount of fees to be awarded."

468 F. Supp. at 401, *citing to Alsager, supra*, 447 F. Supp. at 577.

---

[3] There is some question as to the precedential value of this decision in the Southern District of Iowa. In *Loney v. Scurr, supra*, 494 F. Supp. at 931 n. 7, Judge Hanson himself noted that the *Page-Alsager* approach was undermined by the *Oldham* case, *supra*, at least where legal services organizations (as opposed to public interest groups) are concerned.

I agree with Judge Hanson's theory although I believe that simply basing an award on the proportionate amount of an attorney's salary, as in *Alsager*, is too restrictive. The organization incurs expenses incidental to each attorney's salary in order to enable them to work. In fact, Hanson notes that:

> Nothing in *Alsager* precludes including reasonably ascertainable overhead expenses attributable to the particular litigation, including the costs of support personnel, in an award to be paid to a public interest organization.

468 F. Supp. at 402. Since it is virtually impossible, or at least time consuming, to apportion to each attorney the precise proportion of support staff and services that were used by the attorney, I have devised the following formula that will derive the desired figure for each year and permit the calculation of a reasonable fee to reimburse public interest law groups:

$$\frac{\text{overhead costs}^4}{\text{total annual billable hours}} \div \text{total attorneys} + \frac{\text{attorney's salary}}{\text{total billable hours}} = \text{hourly fee}^5$$

An alternative way to arrive at the same result per annum would be:

4 For the purposes of this calculus, "overhead" encompasses all costs to the organization except attorney's salaries.

5 For example, using an easy illustration, assume a $2,000,000 overhead for forty attorneys. The litigator spent 400 hours of 1600 hours on the case before the court and received a salary of $20,000. The hourly fee would be calculated:

$$\frac{\$2{,}000{,}000 \div 40}{1600} + \frac{\$20{,}000}{1600} = \$31.25 + \$12.50 \quad \$43.75 \text{ per hour}$$

$$\frac{\text{hours on case}}{\text{total hours}} \times \text{salary} + \frac{\text{hours on case}}{\text{total hours}} \times \frac{\text{overhead}}{\text{total attorneys}} = \text{hourly fee}^6$$

Although the concerns articulated by the courts which adopted the "market value" fee for public interest attorneys are valid, I believe that the calculations I propose do not provide a windfall, while complying with the purpose and intent of the Attorney's Fees Act. Additionally, this approach is consistent with the Legal Services Corporations Act and should cause less question about the propriety of fee awards to those organizations. Finally, I believe that in many instances, particularly where a governmental entity is the offender, the difference, if any, between the "market value" fee and the "compensation" fee would be better spent in remedying the disparate treatment or eliminating the discriminatory action. This is not to denigrate the worth or usefulness of the public interest lawyers nor should this be misinterpreted as awarding "incentive" money to private attorneys and not to public interest law groups. Instead, it merely recognizes the reality that a private law firm will not accept civil rights cases with any regularity unless it can be compensated in some manner for the profits it would otherwise earn. Public interest law groups are non-profit organizations and, to restore them to their original financial position, they need not be awarded the profit margin. For these reasons, I have adopted the method of calculation in the award of attorney fees in this case, rendering the award of the amounts listed in Appendix A [text of Appendix omitted].

In calculating the attorney fees under this method, I have separated Ms. Snow's individual claim for-the time that she has spent as a private practitioner in this action and calculated an award according to the traditional method of

6 Using this method with the example in footnote 5, *supra*, the arithmetic is as follows:

$$\frac{\frac{400}{1600} \times \$20{,}000 + \frac{400}{1600} \times \frac{\$2{,}000{,}000}{40}}{400} = \frac{\$5{,}000 + 17{,}500}{400} = \$43.75$$

Northcross. A reasonable "market value" fee in the Detroit metropolitan area for an individual with the skills and expertise of Ms. Snow is $75 an hour. Since the number of hours are reasonable, a total award of $2,936.25 is made to her for 39.15 hours of work.

The remaining hours of work for each attorney were calculated by the formula adopted in this opinion. Since the goal of this method is to compensate the public interest law groups for the cost of providing attorneys, I have not deleted any hours as duplicative. Although duplicative hours are usually omitted, the "reasonable" market value fee that is used will normally account for a certain amount of duplication of services and consultation with other attorneys. Under this method, unlike the traditional one, no extra money exists after costs out of which to recover for certain necessarily duplicative activities. I also reason that two attorneys were necessary in this case and some hours that appear duplicative upon a cursory inspection are not so in reality. On several occasions Ms. Snow and Ms. Magid were called upon to visit their clients to inform them of the progress in the case. In order to facilitate the distribution of the information, the prison population was divided into groups and Ms. Snow and Ms. Magid each spoke with different groups. Similar distribution of labor was made all through the course of this litigation, a fact which is not immediately apparent to someone who is unfamiliar with the course of the litigation. For the same reasons I have allowed recovery for the hours that Ms. Snow and Ms. Magid did not include in their calculation of attorney fees by the traditional method. I understand that this deduction was done to help decrease the amount of attorney fees, but since I have adopted a new approach, these fees should correctly be awarded under the theory of "compensation."

I have disallowed for twelve (12) hours of work performed by law clerks at Wayne County Neighborhood Legal Services and nine (9) hours at Michigan Legal Services since their salary is included in the calculation of overhead.

I have allowed full amounts to be claimed for the costs incurred by both public interest law groups as a part of this litigation, totaling $1,522.90 for Michigan Legal Services and

$670.64 for Wayne County Neighborhood Legal Services.

The final question is whether interest should be awarded on the attorney fees. The practice is by no means uniform and may depend on whether current or historical rates have applied. In the United States District Court for the District of Columbia, the court chose to apply current hourly rates to fees assessed over an eight-year period. *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 395, 402 (D.D.C. 1978). The rationale was that the "inflationary loss suffered by the attorneys because of the long delay in the recovery of their fees" was compensated by an award of current rates and eased the court's task in the calculation. *See also, McPherson v. School District #186*, 465 F. Supp. 749 (S.D. Ill. 1978) , where the court awarded current hourly rates to compensate for increasing overhead and inflationary factors. *Accord, International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir.), *cert. denied*, 449 U.S. 1063 (19000); *Mader v. Crowell*, 506 F. Supp. 484 (M.D. Tenn. 1981); *Fitzpatrick v. Bitzer*, 455 F. Supp. 1338 (D. Conn. 1978), *on remand from* 427 U.S. 445 (1976); *New York v. Darling-Delaware*, 440 F. Supp. 1132 (S.D.N.Y. 1977).

Other courts have calculated attorney fees on the basis of historical rates but, in recognition of inflationary factors and the delay in receipt of funds, have awarded an additional sum to compensate for these factors. For example, in *Vecchione v. Wohlgemuth*, 481 F. Supp. 776 (E.D. Pa. 1979), an additional ten per cent of the calculated fee award was included in the total award "under the rubric of contingency to account for the delay in receipt of payment." 481 F. Supp. at 790. See also, *Keith v. Volpe*, 501 F. Supp. 403 (C.D.. Cal. 1980); *Clark v. Amerada Hess Corp.*, 500 F. Supp. 1067 (S.D.N.Y. 1980) ; *Aamco Automatic Transmissions, Inc. v. Taylor*, 82 F.R.D. 405 (E.D. Pa. 1979). There appears to be no standard method to calculate these awards since some decisions conclude that a percentage of the fee is appropriate, such as *Vecchione, supra*, while others appear to arbitrarily award a set sum, as in *Aamco, supra*. But *see, Allen v. Terminal Transport Co.*, 486 F. Supp. 1195 (N.D. Ga. 1980) , *aff'd without opinion*, 638 F.2d 1232 (1981), *aff'd remanded sub nom. United States v. Terminal Transport Co.*, 653 F.2d 1016 (5th Cir. 1981); *Imprisoned Citizens Union v. Shapp*, 473 F. Supp. 1017

(E.D. Pa. 1979) and *Keisel v. Kremens*, 80 F.R.D.§ 419 (E.D. Pa. 1978), where no additional awards were requested and the courts failed to make such an award *sua sponte*.

I have preferred a more accurate approach than either of these throughout this opinion and I believe that under my method of calculation, interest should normally be awarded to compensate for the delay in payment and inflation. The United States Court of Appeals for the Fifth Circuit reached a similar conclusion in *Gates v. Collier*, 616 F.2d 1268 (5th Cir. 1980), *rehearing granted*, 636 F.2d 942 (5th Cir. 1981). By construing the Civil Rights Attorney's Fees Act broadly, the court concluded that although Congress did not explicitly state that interest on attorney fees should be awarded, recovery of interest was consistent with the purpose of the Act. It reasoned, as I do:

> In analyzing the nature of the interest card, it must be understood that the awarding of interest is in no sense a windfall. Because a dollar today is worth more than a dollar in the future, "the only way [a party] can be made whole is to award him interest from the time he should have received the money. *Louisiana & Arkansas Railway Co. v. Export Drum Co.*, 359 F.2d 311, 317 (5th Cir. 196a). Indeed, this case dramatizes the need for interest on attorneys' fees if the attorneys for the prevailing party are to be adequately compensated. Most of the fees at issue in this case were awarded in 1973. Because of inflation, these awards are worth far less today than they were seven years ago. Had the awards been made in 1973, the attorneys could have been drawing interest on that amount for the last seven years.

(Footnote omitted). 616 F.2d at 1276.

In addition to these reasons, the court in *Johnson v. Summer*, 488 F. Supp. 83 (N.D. Miss. 1980) , awarded interest on the attorney fees because to do otherwise would be to frustrate the deterrent effect that the award was meant to have.

> The history of this litigation demonstrates that, despite the provision for fee-shifting created in § 1988, the ability of a private individual to enforce the civil rights statute is impaired by the opposing resources of the State. If an attorney knew that an order of this court providing for reasonable fees were to remain unenforced for well over a year, while the defendant continues to oppose the claim through the appellate process and by other means, that attorney might be deterred from handling any form of *pro bono* litigation. This court believes that such a result is clearly contrary to the purposes of the 1976 amendment to § 1988.
>
> . . . This court believes that an award of interest on attorney's fees under § 1988 is consistent with this rationale, for it will help to counter the deterrence of otherwise competent and eager counsel from participating in protracted litigation, and it will also "fairly place the economical burden" faced by a prevailing party and his counsel where the fee award remains unpaid for an excessive length of time.

400 F. Supp. at 87.

I agree with the concerns of both courts. Additionally, the length of time involved to try complex cases often precludes a determination of attorney fees until long after the initial expenditures were made and interest should be awarded for the delay in payment. Indeed, in this case, over five years have elapsed since suit was begun and there has been an eighteen-month interval between the opinion and the entry of a final order implementing the remedial actions to be taken by defendants.

In this instance, however, I choose to exercise my discretion and deny interest on the fee award. I am aware that the award will be made from the coffers of the State Treasury, not an individual or private entity. As such, I cannot be blind to the quandary in which the State of Michigan

now founders. By doing so, I do not mean to condone the discriminatory actions of the State that I found to be present in this lawsuit nor should my denial of interest be misinterpreted as a tacit disapproval of awards to public interest law groups. However, I find that the State will be deterred by the award of attorney fees and the organizations will be compensated to a large extent for their costs in bringing the suit. Almost $17,600 would be accrued at a six per cent interest rate calculated simply from the end of each calendar year an~: although such a sum is sizable to the groups involved, it is also very sizable to a state that is struggling against an eroding tax base and a depressed economy that strongly affects the northeastern industrial states.

Conclusion

Having determined that costs and attorney fees are appropriate in this instance, the following is a summary of the award.

Wayne County Neighborhood Legal Services	
Attorney Fees for Judith Magid	$41,927.98
Costs	670.64
Total	$42,598.62
Michigan Legal Services	
Attorney Fees for Charlene Snow	$45,881.55
Costs	1,522.90
Total	$47,404.45
Charlene Snow	$ 2,936.25
Total Award	$92,939.32

An appropriate order may issue.

John Feikens
Chief United States
District Judge

February 2, 1982

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, et al,

Plaintiffs,

-vs- USDC No. 77-71229

PERRY JOHNSON, Director, Michigan Department of Corrections, et al, HON. John Feikens

Defendants.
_____/

STIPULATION AND ORDER
REGARDING ATTORNEY'S FEES

IT IS HEREBY STIPULATED by and between the parties, by their attorneys, in that the following Order may be entered.

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Detroit, MI 48226
(313) 962-1177

Brian MacKenzie
Assistant Attorney General
Corrections Division
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(517) 373-3474

Charlene Snow (26923)
975 East Jefferson Ave.
Detroit, MI 48207
(313) 259-8383

Attorney for Defendants

Attorneys for Plaintiff

ORDER

Plaintiff herein, filed a Motion for Attorney's Fees and Costs and the parties having Stipulated to the entry of this

Order:

IT IS HEREBY ORDERED that JUDITH MAGID be and is awarded $23,782.00 and CHARLENE SNOW be and is hereby awarded $17,224.00 for fees and costs, which shall be paid by Defendants within fifteen (15) days of the date of this Order.

JOHN FEIKENS
United States District Court

Dated: May 9, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, et al,

Plaintiffs,

-vs- USDC No. 77-71229

PERRY JOHNSON, Director, Michigan Department of Corrections, et al, HON. John Feikens

Defendants.
_____/

CHARLENE SNOW (P26923)
DEBORAH LaBELLE (P31595)
Attorneys for Plaintiffs

BRIAN MacKENZIE (P24097)
Attorney for Defendants

ORDER GRANTING PLAINTIFFS' MOTION FOR SYSTEM FOR SUBMISSION OF ATTORNEY FEE

At a session of said Court, held in the Federal Building, Detroit, Michigan, on November 12, 1985
PRESENT: HON. JOHN FEIKENS
U.S. DISTRICT COURT JUDGE

Plaintiffs having filed their Motion for System for Submission of Attorney Fees; the Court and opposing counsel having had the opportunity to review said Motion; and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that Plaintiffs are entitled to attorney fees and that requests for such fees shall be submitted to opposing counsel every six months. Defendants will have twenty-eight days in which to contest the amount of

the fee request.

John Feikens
U. S. District Court Judge

Approved as to form:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, et al.,

Plaintiffs

v. Civil Action No. 77-71229
Honorable John Feikens

PERRY JOHNSON, Director,
Michigan Department of
Corrections, et al.,

Defendants.
_____/

MEMORANDUM OPINION AND ORDER

On November 12, 1985 I entered an order requiring plaintiffs' counsel to submit requests for attorney fees every six months and requiring defendants to submit any objections within twenty-eight (28) days of the request. Plaintiffs' counsel submitted their most recent request on February 19, 1987. Charlene Snow requests an hourly rate of $125 for 261.30 hours ($32,662.50) and $942.38 in costs for a total of $33,604.88.[1] Deborah LaBelle requests an hourly rate of $125 for 234.25 hours ($29,281.25) and $1,535.04 in costs for a total of $30,816.29.[2] Defendants object to any hourly rate greater than $100, to an unspecified number of hours claimed for work on behalf of inmates of the Florence Crane Correctional Facility, and to an unspecified number of allegedly duplicative hours. The parties have been unable to compromise their differences.

I find that an hourly rate of $115 reasonably compensates plaintiffs' counsel for the market value of their services. *Coulter v. Tennessee*, 805 F.2d 146, 149 (6th Cir. 1986) ("[H]ourly rates for fee awards should not exceed the

1 This request excludes 5.85 hours spent on an appeal pending before the United States Court of Appeals for the Sixth Circuit.

2 This request excludes 4.60 hours spent on an appeal pending before the United States Court of Appeals for the Sixth Circuit.

market rates necessary to encourage competent lawyers to under-take the representation in question."), *cert. denied*, 55 U.S.L.W. 3820 (U.S. June 8, 1987), *Northcross v. Board of Educ. of Memphis City Schools*, 611 F.2d 624, 638 (6th Cir. 1979) ("[T]he court should look to the fair market value of the services provided."), *cert. denied*, 447 U.S. 911 (1980) The median hourly rate in 1986 for Detroit attorneys specializing in civil rights litigation is $115.[3] Moreover, $115 is the hourly rate plaintiffs' counsel accepted for their immediately preceeding fee request.

I find that the hours claimed for work on behalf on inmates of the Crane Facility are compensable even though defendants contest the applicability of this Court's judgment at the facility. Plaintiffs' counsel are charged with responsibility for monitoring compliance with this Court's judgment requiring parity of programming between male and female inmates in the custody of the Michigan Department of Corrections. Counsel reasonably monitored compliance throughout the State. *Adams v. Mathis*, 752 F.2d 553, 554 (11th Cir. 1985) ("measures necessary to enforce the remedy ordered by the trial court" are compensable provided they are "reasonably responsive to the prior court order").

The hours claimed by plaintiffs' counsel reflect duplication inevitably present with more than one attorney working on the case. To account for the duplication, I reduce the hours claimed by each attorney ten percent (10%).[4] *See Northcross, supra*, 611 F.2d at 636-637 ("[W]e have approved the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services. Such an approach seems preferable to an attempt to pick out, here and there, the hours which were duplicative."); *Weisenberger v. Huecker*, 593 F.2d 49, 54 n.12 (6th Cir. 1979) (reducing total hours by ten percent (10%) to account for duplication), *cert. denied*, 444 U.S. 880 (1979). *Cf. Louisville Black Police Officers Org. v. Louisville*, 700 F.2d 268, 276 (6th Cir. 1983) ("[Fee applicants do not challenge the district court's across-the-board reduction of 5% of all hours

3 Stiffman, "The 1986 ICLE Survey on Legal Services Fees," at 8.

4 Accordingly, I deduct 26.13 hours from Charlene Snow's 261.30 hours claimed, leaving 235.17 compensable hours. I deduct 23.43 hours from Deborah LaBelle's 234.25 hours claimed, leaving 210.82 compensable hours.

claimed, conceding that such a reduction for duplication was within the district court's discretion.").

Accordingly, IT IS ORDERED that Charlene Snow recover from defendants an hourly rate of $115 for 235.17 hours ($27,044.55) and $942.38 in costs for a total of $27,986.93. IT IS FURTHER ORDERED that Deborah LaBelle recover from defendants an hourly rate of $115 for 210.82 hours ($24,244.30) and $1,535.04 in costs for a total of $25,779.34.

John Feikens
United States District Judge

DATED: July 30, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, et al.,

Plaintiffs,

v. Civil Action No. 77-71229

PERRY JOHNSON, et al., Hon. John Feikens

Defendants.
_____/

MEMORANDUM OPINION AND ORDER

In this case, a plaintiff class composed of female prison inmates sought access to equal educational and vocational opportunities within the Michigan prison system. I have already held that plaintiffs' constitutional rights to equal protection of the laws were violated, because male inmates received greater educational and vocational opportunities than female inmates. This case is now on appeal to the United States Court of Appeals for the Sixth Circuit. That court has agreed to hear the appeal on an expedited basis, and has issued a stay for the pendency of that appeal.

Plaintiffs' attorneys, Charlene Snow and Deborah LaBelle, now seek attorney fees and costs. On November 12, 1985, I entered an order awarding attorney fees to plaintiffs' counsel, and granted plaintiffs' motion to establish a system for payment of these fees. Plaintiffs' attorneys are also to be compensated for monitoring defendants' compliance with my orders in this case. My November, 1985 order requires LaBelle and Snow to submit requests for fees to defendants every six months. Defendants must object to these requests within twenty-eight days of receiving a request.

LaBelle and Snow filed a fee request on August 23, 1989, seeking fees and costs accumulated from February 1, 1987 through December 31, 1987. LaBelle requests $37,755.93 in fees. This amount reflects payment for 262.65 hours of work,

at a rate of $125 per hour, with a 15% enhancement. She also asks for reimbursement for costs of $1,079.39. Snow seeks $36,627.50 in fees. She seeks payment for 254.8 hours, at $125 per hour, with a 15% enhancement. Snow says she incurred costs of $372.90. Both LaBelle and Snow say an enhancement is justified because they have had to wait two years for payment. I held a hearing on these requests, and defendants' objections thereto, on October 2, 1989.

On September 22, 1989, LaBelle and Snow filed a motion for settlement of fees and costs, in which they seek fees and costs for January 1, 1989 through June 30, 1989. I held a hearing on this motion on October 20, 1989. Because the issues in the motions for 1987 and 1989 fees are similar, I will address both motions in this opinion and order.

For the first six months of 1989, LaBelle requests attorney fees of $52,512.50, representing 350.75 hours of attorney time at $150 per hour. She also asks for costs of $8,662.60. For this same period, Snow requests $56,527.50 in attorney fees for 376.85 hours at $150 per hour. She seeks $3,391.56 for costs.

Defendants make similar objections to both the 1987 and 1989 fee requests. First, they argue that, notwithstanding my 1985 order granting fees, plaintiffs are not entitled to any fees unless they are found to be prevailing parties, as required in 42 U.S.C. § 1988. Defendants ask me to hold a fee award in abeyance until the court of appeals reaches the merits of this case, and so decides which party prevailed. Second, defendants contend that both the $125 hourly rate requested for 1987 and the $150 hourly rate requested for 1989 are excessive. Third, they say I should reduce LaBelle's and Snow's hours due to duplication of efforts, unreasonable expenditures of time, and time spent on matters unrelated to this case.

As to the 1987 request only, defendants argue a fee enhancement is inappropriate. Finally, with regard to the 1987 fees, they argue that hours spent on plaintiffs' motion for contempt and on defendants' appeal from my order appointing an administrator are not monitoring hours, but attorney hours. Therefore, plaintiffs should only receive fees

for this time, if they are the prevailing parties.

I. THE PREVAILING PARTY ISSUE

My November 12, 1985 order in this case resolves the prevailing party issue by granting plaintiffs attorney fees. This order states in part:

> It is hereby ordered that plaintiffs are entitled to attorney fees and that requests for such fees shall be submitted to opposing counsel every six months.

I will not now revisit the decision to award plaintiffs post-judgment attorney fees. The parties stipulated to the entry of this order four years ago, and since then have abided by their agreement. While 42 U.S.C. § 1988 does provide that prevailing parties in civil rights suits may receive attorney fees, defendants should have voiced this objection in 1985. Neither this statute nor my order requires me to redecide the prevailing party issue every six months throughout this prolonged litigation. Rather, the order states plaintiffs are entitled to attorney fees.

My 1985 order has never been appealed. Therefore, plaintiffs are entitled to fees. The only issue now is the amount of fees to be awarded.

Defendants have not objected to plaintiffs requests for costs in either 1987 or 1989. Since I find these costs reasonable, I hereby GRANT plaintiffs the costs they requested for 1987 and 1989.

Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979) *cert. denied* 447 U.S. 911 (1980), established a framework for use in determining reasonable attorney fees in civil rights cases. *Louisville Black Police Officers Organization, Inc. v. Louisville*, 700 F.2d 268, 274 (6th Cir. 1983). Under *Northcross*, I must determine the number of hours to be compensated, and multiply this figure by a reasonable hourly rate. See *also Hensley v. Eckerhart*, 461 U.S 424, 433 (1982). This rate should be based on the market rates in the relevant community. *Blum v. Stenson*, 465 U.S. 886, 895

(1983).

II. DEFENDANTS' OBJECTIONS TO NUMBER OF HOURS BILLED

LaBelle and Snow have submitted affidavits documenting the time they spent on particular tasks related to this case. Defendants argue that I should reduce these hours by at least 10% because LaBelle and Snow needlessly duplicated their efforts and spent excessive time. Defendants object to hours spent reviewing co-counsel's work, conferring with co-counsel, and appearances by both LaBelle and Snow at meetings and hearings.

In their objections to the 1989 fee request, defendants also contend that plaintiffs' counsel seek compensation for time spent on tasks unrelated to this case. Defendants say time spent on legislative efforts to get greater appropriations for female inmates' education is unrelated. They also argue time spent reviewing an inmate's denial of community placement and preparing fee summaries is not related to this case.

Because I find that plaintiffs' counsel have not spent excessive time, unnecessarily duplicated their efforts or worked on matters unrelated to this case, I will not reduce the number of hours billed. *Hensley, id.*, requires that attorney hours be reasonably spent. I have discretion to grant attorney fees for time spent conferring with co-counsel. *Berberena v. Coler*, 753 F.2d 629, 633 (7th Cir. 1985); *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1337 (D.C. Cir. 1982).

I find that LaBelle and Snow spent a reasonable amount of time conferring and reviewing each other's work, so I will exercise my discretion and grant fees for this time. LaBelle's and Snow 5 affidavits show that they generally worked on separate tasks; each made a separate contribution. The hours they spent conferring are reasonably proportionate to their total hours. Given the magnitude and complexity of this case, such consultation is at least reasonable, and probably necessary.

Defendants argue that LaBelle and Snow unnecessarily attended hearings and meetings together. Defendants concede that I may refer to the number of lawyers they used in similar situations as an indication of the effort required. *Brief in Support of Defendants' Objections to Fee Petitions*, filed September 6, 1989, at 8-9 *citing Ramos v. Lamm*, 713 F.2d 546, 554 (10th Cir. 1983). As plaintiffs point out, defendants often had two attorneys attend the evidentiary hearings I held in April of this year. Further, if both plaintiffs' attorneys had not attended, LaBelle and Snow would have had to spend time conferring about the hearings instead. I find no unnecessary duplication in having both plaintiffs' attorneys attend these complex hearings, nor in appearing at any of the other matters defendants refer to.

As to the 1989 fee request, defendants claim plaintiffs' counsel billed time spent on matters unrelated to this case. First, defendants argue the 3.1 hours plaintiffs' lawyers spent preparing fee summaries for this motion are incompensable overhead. I disagree. Plaintiffs may recover attorney fees for time spent litigating the fee issue itself. *Northcross, id.*, 611 F.2d at 637.

Second, defendants object to paying for 19.8 hours spend on attempts to procure greater state appropriations for the education of female inmates. Such appropriations go to the heart of the dispute in this case. Defendants have argued in the past that insufficient appropriations prevent them from complying with my orders. Plaintiffs' lawyers would be remiss if they had not attempted to remove this barrier to compliance. I find that these 19.8 hours are closely related to the issue in this case, are reasonable, and are accordingly compensable.

Third, defendants argue that 8.65 hours spent on telephone calls concerning inmate Susan Fair's denial of community placement is unrelated to this case. Plaintiffs say they only billed for two hours on this issue. Given the magnitude of the 727.6 total hours claimed in the 1989 petition, this 6.65 hour difference is de *minimis*. I find that the time plaintiffs' counsel spent investigating this issue is related to this case and compensable.

Plaintiffs' counsel claim that Fair, a named plaintiff, has been involved in this case. Defendants do not dispute this point. LaBelle and Snow say that when Fair was denied placement in the community, they investigated the possibility that this denial was in retaliation for Fair's involvement in *Glover*. While plaintiffs' counsel decided not to bring this matter before me, Federal Rule of Civil Procedure 11 requires them to do such investigation before bringing the issue here. Since the possibility of such retaliation has been addressed in this case previously, good representation required that LaBelle and Snow at least check into Fair's allegation. Accordingly, I will not reduce plaintiffs' time on this basis.

Finally, defendants object to charges for 13.9 hours spent on Trust work. This matter is clearly related to the present case. This Trust, known as the Judith Magid Trust Fund, was established by my September 8, 1980 Interim Order. Defendants were to make quarterly payments into the Trust, to compensate for certain back wages that plaintiff inmates should have received. In my September 14, 1989 Memorandum Opinion and Order, I found that defendants were delinquent in making these payments. *Id.* at 43-48. I now find that plaintiffs' 13.9 hours are compensable, because the Trust is central to the relief ordered in this case, and was an issue in the recent contempt proceedings.

In summary, I find no unnecessary duplication of effort, or excessive time spent on this case by plaintiffs' counsel. I also find that the issues defendants object to are related to this case and therefore compensable. Accordingly, I GRANT LaBelle and Snow compensation for the hours they requested, without reduction.

III. DEFENDANTS' OBJECTIONS TO REQUESTED HOURLY RATES

Plaintiffs request an hourly rate of $125, with a 15% enhancement for their 1987 fees. They seek $150 per hour for their 1989 fees. In addition to their own affidavits, LaBelle and Snow have submitted the affidavits of other local lawyers who practice in the civil rights litigation field. These lawyers say that a rate of $150 is a reasonable hourly rate for the type of work LaBelle and Snow performed in *Glover*.

Defendants object to both the $125 and $150 hourly rates, as well as to the 1987 enhancement. They suggest that I use $92 per hour as a benchmark. This is the median hourly billing rate reported in the November, 1988 issue of the Michigan Bar Journal.

Even using $92 per hour as a starting point, I find as a matter of fact that $135 per hour is a reasonable current rate for plaintiffs' counsel. Rather than add a 15% enhancement to the historic rate of $125 requested for 1987, I GRANT the current rate of $135 per hour, to compensate for the two-year delay in payment. See *Knop v. Johnson*, 712 F. Supp. 571, 584 (W.D. Mich. 1989) *citing Louisville Black Police Officers, id.*, 700 F.2d at 275-276; and *Cantor v. Detroit Edison*, 86 F.R.D. 752, 767 (E.D. Mich. 1985) (applying a current, rather than historic, hourly rate to compensate for delay in payment). In sum, I award plaintiffs' attorneys compensation of $135 per hour for both their 1987 and 1989 fee requests.

The goal of such attorney fee awards is to "make and award fees which are 'adequate to attract competent counsel, but which does not produce windfalls to attorneys.'" *Louisville Black Police Officers, id.*, 700 F.2d at 278 *citing Northcross, id.* I retain discretion to achieve this goal. *Louisville Black Police Officers, id.* I find that an hourly rate of $135 meets this goal. As in *Knop, id.* at 583, and *NAACP v. Detroit Police Officers Association*, 620 F. Supp. 1173, 1183 (E.D. Mich. 1985) *reversed on other grounds*, 819 F.2d 1142 (6th Cir. 1987), I find it unreasonable to confine plaintiffs' counsel to a median market rate.

LaBelle and Snow submitted affidavits detailing their qualifications and experience. LaBelle was admitted to the Michigan Bar in 1979. She filed her appearance in this case in 1985. She has considerable experience in prisoners' rights and civil rights litigation. She normally bills at an hourly rate of $150 for similarly complex litigation. Snow was admitted to the State Bar in 1976, and entered her appearance in this case before LaBelle. She has published several articles in this area, and has extensive experience with similar cases.

In July, 1987, I awarded LaBelle and Snow attorney fees

in this case at $115 per hour. *Memorandum and Opinion Order* filed July 30, 1987. I based this award in part on the fact that they had accepted this rate for their immediately preceding fee request. *Id.*

An attorney's special skill and experience should be reflected in her hourly rates. *Blum v. Stenson, id.*, 465 U.S. at 898. See *also Knop* at 582. I find that LaBelle's and Snow's skill and experience with this and similar cases merit an hourly rate of $135, rather than the $92 median rate. The recent evidentiary hearings in this case required counsel to be well acquainted with this case's history. Any other lawyers would have needed more hours to do this same work, and their higher hourly rate reflects this factor.

Additionally, my award of $115 approximately two and one-half years ago supports this conclusion. I find it reasonable that counsel's hourly fee should increase by twenty dollars in this time.

Finally, in *Knop v. Johnson, id.*, Judge Richard Enslen of the United States District Court for the Western District of Michigan recently awarded lawyers with similar roles and qualifications $125 to $150 per hour for out-of-court time and $150 to $190 per hour for in-court time. *Knop* and *Glover* are both large-scale prisoners' rights cases of similar complexity in Michigan. Judge Enslen specifically found that plaintiffs' counsel merited an hourly rate well above the median rate, due to their experience, scope of practice, quality of representation, and complexity of issues involved. *Id.* at 584. Judge Enslen held that these hourly rates are reasonable for attorneys practicing in Michigan. *Id.* Because of the similarity between *Glover* and *Knop*, I find that the goal of uniformity discussed in *Northcross, id.*, 611 F.2d at 636, is served by my reference to the hourly rates used in *Knop*.

Given the range of prevailing market rates established in *Knop*, I find that $135 per hour is a reasonable rate for the combined in-court and out-of-court time expended by LaBelle and Snow. Particularly in their 1989 fee application, many hours were spent in court for evidentiary hearings. This hourly rate adequately reflects the market value for both types of activities.

In conclusion, I GRANT plaintiffs' counsel their combined requested costs of $1,452.29 for 1987, and combined requested costs of $12,054.16 for January through June of 1989. I also GRANT LaBelle attorney fees of $82,809, for 262.65 hours in 1987 and 350.75 hours in 1989, at $135 per hour. I GRANT Snow attorney fees of $85,272.75, for 254.8 hours in 1987 and 376.85 hours in 1989, at $135 per hour.

IT IS SO ORDERED.

John Feikens
United States District Judge

Dated: Nov. 27, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

MARY GLOVER, et al.,

Plaintiffs,

v. No. 77-CV-71229-DT
Hon. John Feikens

PERRY JOHNSON, et al.,

Defendants.
_____/

MEMORANDUM OPINION AND ORDER

In this case, I held that a plaintiff class of female inmates, seeking access to equal educational and vocational opportunities in the Michigan prison system, demonstrated a constitutional denial of equal protection because male inmates received greater educational and vocational opportunities than female inmates. *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979), *aff'd*, *Cornish v. Johnson*, 774 F.2d 1161 (6th Cir. 1985), *cert. denied*, *Johnson v Manzie*, 478 U.S. 1020 (1986).[1] Later rulings in this case are now on appeal to the United States Court of Appeals for the Sixth Circuit. *Glover v. Johnson*, No. 77-71229 (E.D. Mich. Sept. 14, 1989)(order directing the Michigan Department of Corrections to appoint an administrator) *appeal docketed* No. 89-2191 (6th Cir. 1989); *Glover v. Johnson*, No. 77-71229 (E.D. Mich. Nov. 27, 1989) (order granting attorney fees), *appeal docketed* No 89-2421 (6th Cir. 1989).

I. Procedural History Regarding Attorney Fees and Costs

The issue before me presently is attorney fees and costs. On November 12, 1985, I entered an order awarding attorney fees to plaintiffs' counsel and granted plaintiffs' motion to

[1] *See also*, *Glover v. Johnson*, 510 F. Supp. 1019 (E.D. Mich. 1981).

establish a system for payment of these fees.[2] The November 1985 order requires plaintiffs' attorneys to submit requests for fees to defendants every six months. Defendants must object to each request within twenty-eight (28) days of receipt.

On November 27, 1989, I issued an order and opinion further addressing attorney fees and costs. In that opinion, I discussed fees and costs covering the periods February 1, 1987 through December 31, 1987 and January 1, 1989 through June 30, 1989. I granted plaintiffs' request for attorney fees and costs with slight modifications. I ruled that plaintiffs' counsel are entitled to attorney fees under the 1985 order; that they have not spent excessive time on this case; that they have not unnecessarily duplicated their efforts; and that they have not requested fees from defendants for matters unrelated to this case.

Before me presently is plaintiffs' motion for settlement of attorney fees and costs. On or about January 16, 1990, Deborah LaBelle and Charlene Snow, attorneys for plaintiffs, submitted a list to defendants that delineated attorney fees and costs for the period July 1, 1989 through January 8, 1990. LaBelle seeks fees of $20,700.00. This amount reflects 138.0 hours of work billed at a rate of $150.00 per hour. She also requests reimbursement of $1335.02 in costs. Snow seeks fees of $40,882.50 and costs of $3877.67. Her fees reflect 272.55 hours of attorney time billed at a rate of $150.00 per hour, and 5.50 hours of legal assistant time billed at a rate of $40.00 per hour.

Pursuant to my 1985 order, on February 13, 1990, defendants filed objections to the payment of attorney fees and costs. Defendants raise a host of objections to plaintiffs' list of fees and costs. Many of their objections were previously addressed in my November 27, 1989 opinion and order. Defendants claim that LaBelle and Snow excessively duplicated their efforts; that they listed hours for work performed on matters unrelated to this case; that work related to issues on appeal should be deferred until a final decision is

[2] Under my order, plaintiffs' attorneys are compensated for monitoring defendants' compliance with my orders in this case, as well as for their legal work. *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624, 637 (6th Cir. 1979)("Services devoted to reasonable monitoring of the court's decrees. . .are compensable services.").

made by the United States Court of Appeals for the Sixth Circuit to determine if plaintiffs are prevailing parties on those issues; that plaintiffs' attorneys claim an excessive hourly rate; that plaintiffs do not distinguish between monitoring, non-trial legal, and trial activities; and that legal assistant fees should be included in the attorney hourly rate as overhead. I held a hearing on these motions on March 19, 1990.

II. Issues on Appeal

A number of issues from my November 27, 1989 order are on appeal to the United States Court of Appeals for the Sixth Circuit. These issues include whether plaintiffs are prevailing parties; whether plaintiffs' attorneys' lobbying efforts are compensable; and whether LaBelle and Snow excessively duplicated each other's efforts. I repeat my rulings on these issues here, and incorporate these by reference.[3] Although similar issues are raised in the instant motions, they remain separate and I must address them substantively, regardless of the appeal of the November 27, 1989 order.

III. Objections Raised by Defendants

The United States Court of Appeals for the Sixth Circuit has established a framework for determining reasonable attorney fees in civil rights cases. *Northcross v Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979) *cert. denied* 447 U.S. 911 (1980); *Louisville Black Police Officers Organization Inc. v Louisville*, 700 F.2d 268, 273-74 (6th Cir. 1983). I must determine the number of hours to be compensated and multiply this figure by a reasonable hourly

[3] In that opinion, I ruled that plaintiffs are entitled to attorney fees under my November 12, 1985 order; that plaintiffs' attorneys did not spend excessive time on this case, did not unnecessarily duplicate their efforts, or seek compensation for time spent on tasks unrelated to this case; and that $135.00 per hour is an appropriate rate of compensation for plaintiffs' attorneys.

rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1982).[4] This rate should be based on the market rates in the relevant community for similar work. *Blum v. Stenson*, 465 U.S. 886, 895 (1983).

Defendants and plaintiffs agree on one issue. They agreed at the March 19, 1990 bearing that defendants should pay LaBelle $1702.00 and Snow $1966.50 in monitoring fees, representing 31.90 hours of work paid at the monitoring rate of $115 per hour as stipulated by the parties and as provided under my 1985 order. I GRANT plaintiffs' motion regarding monitoring fees.

Defendants raise a number of objections, however, to the remainder of the attorney fees and costs. First, defendants charge that plaintiffs' attorneys excessively duplicated each other's efforts. They state that time in excess of 15 hours was spent reviewing co-counsel's work, conferring with co-counsel, and other duplicative matters. I addressed this issue in the November 27, 1989 opinion and order and ruled that given the complexity of this case, consultation between the attorneys is not unreasonable. The time plaintiffs' attorneys spent conferring and reviewing each other's work was minimal over a six-month period and probably necessary. *Barberena v. Coler*, 753 F.2d 629, 633 (7th Cir. 1985); *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1337 (D.C. Cir. 1982).

Second, defendants object that plaintiffs are claiming fees and costs for matters unrelated to this case. I find defendants' claims without merit. Defendants contend that hours spent on matters relating to two class plaintiffs are irrelevant to this case. At issue are telephone calls with inmate Susan Fair and legal work done on behalf of inmate Anita Alcorta.

Defendants assert that telephone calls related to the denial of Fair's community placement are not compensable.

[4] The resulting figure is referred to as the lodestar. *Knop v. Johnson*, 712 F. Supp. 571, 574 n.1 (W.D. Mich. 1989).

Plaintiffs counter in an affidavit filed March 21, 1990 by LaBelle that telephone conversations with Fair pertained to Fair's workpass and the status and inadequacy of the Camp law library.[5] LaBelle states in her affidavit that she filed a complaint on behalf of Fair in the Circuit Court for the County of Ingham relating to community placement, but that time spent on that matter was not listed in the six-month statement of attorney fees. According to Congress, the courts' purpose should be "to use the broadest and most effective remedies available to them to achieve the goals of the civil rights laws." *Northcross*, 611 F.2d at 633. Because telephone calls with Fair pertain to issues of educational and legal opportunities for women in Michigan prisons, I find them directly relevant to this case and therefore the associated fees are compensable.

Similarly, defendants object to Snow's time expended on access-to-court issues for Anita Alcorta. Defendants claim that Alcorta refused to return other prisoners' legal documents and that work spent on this issue is irrelevant to *Glover*. Plaintiffs contend that Snow was responding to Alcorta's complaint of denial of access to her legal papers. I find that the *Glover* access-to-court ruling covers Snow's work on behalf of Alcorta. I therefore find it compensable. Plaintiffs' motion regarding fees for work performed on behalf of Fair and Alcorta is GRANTED.

Likewise, defendants argue that plaintiffs' attorneys' lobbying efforts to secure greater funding for education of female prisoners is outside of the scope of this case. As I held in my November 27, 1989 opinion and order: "Defendants have argued in the past that insufficient appropriations prevent them from complying with my orders. plaintiffs' lawyers would be remiss if they had not attempted to remove this barrier to compliance." Opinion at 7. Accordingly, I find hours spent on this issue to be reasonable and compensable. *DeMeir v. Gondles*, 676 F.2d 92, 93-94 (4th Cir. 1982).

Third, defendants claim that plaintiffs' hourly rate of $150.00 is excessive and unsupported by market rates of attorneys with similar qualifications in similar types of cases. Defendants assert that the rate was not approved by this court for court time or monitoring. In my November 27, 1989

[5] These activities totalled 2.35 hours over the six-month period.

opinion and order I addressed this issue thoroughly and approved a compensation rate of $135.00 per hour for plaintiffs' attorneys. I find no reason to alter that rate at this time.

Fourth, defendants argue that plaintiffs do not distinguish among monitoring, non-trial legal work, and trial activities. The parties have agreed that plaintiffs' attorneys shall be compensated at the rate of $115.00 per hour for time spent monitoring defendants' compliance with my orders in this case. I have also approved a rate of $135.00 per hour as compensation for legal work performed by plaintiffs' attorneys. This division is sufficient for the purposes of determining attorney fees. In future requests for fees, plaintiffs' attorneys shall distinguish between monitoring and legal work.

Fifth, defendants assert that legal assistant fees should be included in the attorney hourly rate as overhead, not charged separately. Cases addressing this issue clarify that legal assistant fees are a reasonable cost of practicing law and should be compensated in attorney fee awards. *Missouri v. Jenkins*, 109 S. Ct. 2463, 2470-72 (1989). I therefore GRANT plaintiffs' request of 5.50 hours of legal assistant hours, which were actually performed by Snow, and billed at a rate of $40.00 per hour.

Sixth, defendants object to costs requested by plaintiffs. As I find plaintiffs' costs necessary and reasonable, I hereby GRANT them in the amount of $5212.68.

For the foregoing reasons, plaintiffs' motions are GRANTED as follows: This court hereby GRANTS monitoring fees of $1702.00 for LaBelle, representing 14.8 hours billed at a rate of $115.00 per hour, and $1966.50 for Snow, representing 17.1 hours billed at a rate of $115.00 per hour; GRANTS plaintiffs' motion for settlement of attorney fees in the amount of $16,632.00 for LaBelle, representing 123.2 hours billed at a rate of $135.00 per hour, and $34,705.75 for Snow, representing 255.45 hours billed at a rate of $135.00 per hour, and 5.50 hours of legal assistant time billed at a rate of $40.00 per hour; and GRANTS costs in the amount of $1335.02 for LaBelle and $3877.67 for Snow.

IT IS SO ORDERED.

John Feikens
United States District Judge

Dated: May 21, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

MARY GLOVER, et al.,

Plaintiffs

v.

No. 77-CV-71229-DT
Hon. John Feikens

PERRY JOHNSON, et al.,

Defendants.
_____/

OPINION AND ORDER

Before me is Plaintiffs' Motion For Settlement Of Attorney Fees And Costs. First, plaintiffs' counsel seeks reimbursement for 3.0 hours expended by Martin Geer and .1 hours by his paralegal on the issue of double bunking at the Scott facility. Second, plaintiffs' counsel seeks an increase in the hourly rate of compensation, from $135.00 an hour to $165.00 an hour. Except for these amounts in dispute, defendants paid all attorney fees owed at the current rate of $135.00 for the six-month period ending June 30, 1992.

Oral argument was held on November 12, 1992. At that time, I ruled that defendants were not required to reimburse plaintiffs' counsel for the time spent on the issue of double bunking because that is not at issue in this case. I now move to plaintiffs' request for a fee increase.

In 1989, plaintiffs requested a fee increase from the prior rate of $115.00 an hour to $150.00 an hour. I granted plaintiffs' counsel an increase to the present level of $135.00 per hour. The U.S. Court of Appeals for the Sixth Circuit affirmed my ruling. *Glover v. Johnson*, 934 F.2d 703, 716 (6th Cir. 1991).

The determination of a reasonable hourly rate is reached by calculating the prevailing market rates in the relevant

community. *Blum v. Stenson*, 46 U.S. 886, 895 (1984). In Blum, the United States Supreme Court stated that:

> It is intended that the amount of fees awarded under (1988) be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases, and not be reduced because the rights involved may be nonpecuniary in nature.

Id. at 898.

At the hearing on this motion held on November 12, 1992, I asked the parties to provide me with information on attorney fee hourly rates awarded in prisoner civil rights cases by other judges in this district.

In a complex prisoner civil rights case before me,*Hadix, et al. v. Johnson, et al.* (Case No. 80-73581), plaintiffs' counsel Michael Barnhart currently receives attorney fees at the rate of $150.00 per hour. In *Prisoner's Progress Association v. Brown* (Case No. 76-72416), Judge George E. Woods accepted Magistrate Judge Thomas Carlson's Report and Recommendation on July 31, 1992 awarding plaintiffs' counsel fees at $150.00 per hour. Similarly, in *Johnson v. Worley* (Case No. 89-73335), Judge Avern Cohn awarded plaintiff's counsel Daniel Manville $150.00 per hour on June 16, 1992.

From this information, I conclude that the prevailing market rate in this district for prisoner civil rights cases for attorneys with Martin Geer and Deborah LaBelle's experience is $150.00 an hour.

Therefore, IT IS HEREBY ORDERED that Plaintiffs' Motion For Settlement Of Attorneys Fees is GRANTED in part and DENIED in part as stated herein.

John Feikens
United States District Judge

Dated: Dec. 17, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, et al.,

Plaintiffs,

v. Civil Action No. 77-71229

PERRY M. JOHNSON, et al., Hon. John Feikens

Defendants.
_____/

OPINION AND ORDER REGARDING
PLAINTIFFS' MOTION FOR ATTORNEY FEES

Attorneys for the plaintiff class have petitioned for an award of attorney fees for the period of July 1, 1995 through December 31, 1995. Defendants initially object to the payment of the fees, claiming that the Prison Litigation Reform Act of 1995 ("the Act" or "PLRA"), which became effective April 26, 1996, is retroactive in its application to attorney fees in cases such as this. Attorneys for the plaintiff class contend in opposition that that Act is not retroactive, is prospective, and does not, therefore, affect the petition for fees in the period covered.

It is necessary for me, therefore, to make a determination whether that Act has retroactive application to attorney fees.

The intent of Congress for the application of the attorney fees provisions of PLRA is not clear. Plaintiff class argues that Congress intended prospective application of the attorney fees provisions of the PLRA since only one of the ten sections of PLRA explicitly provides for its application to pending cases. As evidence, they assert that the attorney fees provisions were included in the section applying to pending cases when the bill was passed by the House of Representatives, but transferred to another section before the bill was signed into law. Plaintiff class' inference does not constitute a plain showing of congressional intent.

If a statute were to operate retroactively, there is a presumption that it does not govern absent clear congressional intent favoring such a result. *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1505 (1994). To determine whether a statute operates retroactively,

> The court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Landgraf, 114 S.Ct. at 1499.

This statute does not apply to the fees in question that have not been paid. If it did, it would modify the negotiated agreement between the parties in regard to payment for services. Both parties have been working for many years according to the settled orders of this court both for the payment of fees and also for the monitoring of fees. Application of this law would have a retroactive effect in its disruption of the established expectations of the parties, and again there is no evidence of statutory intent to affect that arrangement.

The essence of the defendants' contention is that a grant of attorneys' fees is prospective in nature and does not affect the substantive rights of the parties. The awarding of fees to a prevailing party, however, does not present the same issues as the taking away of fees from a prevailing party because of a recently-passed statute. In this case, work has been done and fees have been paid pursuant to the orders of this court for almost a decade. Thus the application of PLRA is not prospective in nature because it takes away fees already earned, which would in turn adversely affect the substantive rights of the plaintiff class. The cases cited by the defendants are therefore inapposite to the issues presented by application of PLRA to this case.

Having determined that the Prison Litigation Reform Act of 1995 is not retroactive in its application and, therefore, does not affect attorney fees generated and presented for the period of July 1, 1995 through December 31, 1995, I must now determine what fees are to be paid.

Multiple briefs have been filed and a hearing was held on May 7, 1996 on these issues. The petition for fees relates to the services both of Michael Barnhart and Deborah LaBelle.

Defendants make the following objections:

1. They object to time spent by Deborah LaBelle and Michael Barnhart, counsel to the plaintiff class, in consulting, conferring, or discussing matters between themselves. The hours objected to are thirteen in a period of six months between July 1, 1995 through December 31, 1995. Again, as I have in the past, I find that these hours "given the magnitude and the complexity of this case, [that] such consultation is at least reasonable and probably necessary." See *Glover, et al. v. Johnson, et al.* November 27, 1989 Opinion and Order, p. 6, and *Glover, et al. v. Johnson., et al.*, 935 F.2d 703, 716-717 (1991). A similar ruling is applicable here and, thus, the objection of the defendants to the payment of these hours is overruled.

2. Defendants object to the payment of fees incurred in the U.S. Court of Appeals for the Sixth Circuit appellate cases involving these parties, being Appeal Nos. 95-1903, 95-2037 and 95-2120. These appeals all stemmed from this court's orders establishing a Compliance Committee in order to achieve finality in this case. It was this court's purpose, because of the excessive litigiousness that surrounded compliance with this court's orders, that a new approach be taken. That approach was to "take the lawyers out of the case" and have the Wardens of the two women's prisons, the Special Administrator, the Court Monitor and a representative of the plaintiff class meet and resolve these complex issues. The Committee members were unable to reach any agreement and, thus, it was necessary to disband this approach. When the court vacated its orders establishing the Compliance Committee, plaintiff counsel filed a motion to dismiss these

appeals that the court's order had generated. Initially the defendants opposed the dismissal but then, on stipulation, agreed to voluntarily dismiss the appeals. This was done only after the submission of briefs in the Sixth Circuit.

Even though defendants objected to the court's orders for a Compliance Committee to attempt to achieve finality in the case and appealed these orders, which they subsequently voluntarily dismissed, they argue that the plaintiff class is not the prevailing party and, therefore, the fees cannot be ordered paid.

The argument is rejected, and the defendants are ordered to pay all fees in Appeal Case Nos. 95-1903, 95-2037 and 95-2120.

3. In Appeal Case No.94-1617, in which the court of appeals ruled against the contention of the plaintiff class that inmate parental custody cases require legal assistance, that case, I am informed, is now the subject of a petition filed by the plaintiff class for *certiorari* to the U.S. Supreme Court. Thus, even though I am aware of a substantial argument that the plaintiff class makes for payment of fees involved in this matter, I am of the opinion that this matter should be stayed to conform to the Sixth Circuit's stay while the petition for *certiorari* is pending.

It appears that a similar ruling is applicable to Appeal Case No. 95-1521, which is still before the Sixth Circuit. Here also the argument is made by plaintiffs' class counsel that the prevailing party doctrine does not apply, as defendants argue it should; but, the matter of fees is best stayed until the Sixth Circuit has resolved the issue involved in the appeal on the merits.

4. Defendants object to the payment of 11.15 hours, which they argue concerns issues not related to the *Glover* case. It appears that defendants are engaged in hair-splitting. One so-called non-*Glover* issue arose out of a claim of retaliation by an inmate, a member of the class who claimed that her jewelry had been confiscated as contraband after she participated in this case; and another inmate similarly situated was apparently removed from her prison detail. Plaintiffs' class

counsel pursued these matters with defendants' counsel, and I am informed that both these actions were reversed. Another claimed issue on retaliation involved complaints with regard to excessive heat at Camp Branch. The complainants were two women inmates who received "misconducts" for complaining; and, when plaintiffs' class counsel brought this issue to defendants' counsel, the two women inmates did receive rehearings and their "good time" credits were restored. A third so-called non-*Glover* issue involved plaintiffs' class counsel Michael Barnhart's appearance at legislative hearings. Barnhart appeared at the legislative hearings because matters regarding the *Glover* case were discussed by the Director of the Department of Corrections. It appears to me that Barnhart properly acted in monitoring these matters inasmuch as they relate directly to this case.

Thus, the objection of defendants to the payment of 11.15 hours to plaintiffs' class counsel is overruled.

5. The final matter in the petition for fees relates to a total of 50.05 hours paid to Gale Greiger as a paralegal. I have previously ruled on this matter of paralegal assistance. See my Opinion and Order dated May 20, 1990 and December 21, 1990, neither of which was appealed.

Accordingly, the objection by the defendants to the payment of 50.05 hours of the paralegal at the rate of $45 an hour is overruled.

IT IS SO ORDERED.

John Feikens
United States District Judge

Dated: 6/3/96

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, *et al.*,

Plaintiffs, Case No. 77-71229

vs. Hon. John Feikens

PERRY JOHNSON, *et al*

Defendants. Filed
Feb 6 3:32 PM '97

OPINION AND ORDER

I. BACKGROUND

In an opinion and order filed December 4,1996, I held that the relevant provisions of the Prison Litigation Reform Act, 18 U.S.C. § 3626 ("PLRA" or "the Act") setting a cap on fees in prison litigation cases apply in this case to hours worked by plaintiffs' attorneys after April 26, 1996, the effective date of the Act. Plaintiffs now move for reconsideration, for clarification, and for an evidentiary hearing to argue and present facts that the Act unconstitutionally violates prisoners' rights of equal protection.[1] Accepting *arguendo* plaintiffs' proposed facts as proven. I conclude that the attorney fee provisions in the PLRA do not violate plaintiffs' rights of equal protection. I therefore deny plaintiffs' motion for reasons stated below, and do not deem it necessary to hold an evidentiary hearing or

[1] Plaintiffs also request clarification of the December 4, 1996 order with regard to payment of unobjected to fees which remain outstanding. That order for payment of fees includes fees for which found defendants' objections to be without merit as well as outstanding fees for which defendants made no timely objections. This represents 63.35 hours for Deborah LaBelle, 34.25 legal assistant hours, and 30 hours for Jeffrey Dillman.

inform the U.S. Department of Justice, pursuant to 28 U.S.C §2403(a) of the constitutional arguments raised against the PLRA.

II. ANALYSIS

The provision at issue in this case provides.

> No award of attorney's fees in an action [brought by a prisoner in which attorney fees are authorized] shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

§803(d)(7)(d)(3). The effect of this provision is to reduce the rate for plaintiffs' counsel to $112.50 per hour for hours worked after the Act's enactment from the rate of $150 per hour established years ago in this case pursuant to a remedial plan proposed by defendants.

Plaintiffs contend that the actual effects of the attorney fee provisions are far more reaching. Specifically, they offer to prove the following points:

> a. that the majority of prisoner lawsuits filed in the federal courts are filed *pro se;*
>
> b. that the majority of frivolous prisoner lawsuits are dismissed by the federal courts prior to the appointment of counsel;
>
> c. that the PLRA's attorney fee provisions will have no impact on limiting frivolous prisoner lawsuits filed in the federal courts, as most such suits are *pro se;*
>
> d. that to the extent that the PLRA's fee provisions are intended to limit frivolous prisoners lawsuits, it is not rationally related to this goal as attorney fees are awarded only to

prevailing parties who have filed meritorious suits;

e. that at both a national and local level, there is an insufficient pool of qualified counsel to represent prisoners in civil rights lawsuits, particularly in class action suits;

f that one of the effects of the PLRA's fee provisions will be to further limit and discourage qualified counsel from representing prisoners in meritorious civil rights lawsuits filed to address constitutional violations;

g. that $112.50 is well below the prevailing market rate for specialized civil rights litigations';

h. the PLRA fee provisions will further limit and discourage counsel from representing prisoners in meritorious civil rights claims where constitutional violations exist:

i. that to the extent that the PLRA's fee provisions are intended to have a positive impact on the judicial economy and efficiency of federal courts, it is not rationally related to this goal as it does not affect the vast majority of cases and it deprives the courts of qualified competent counsel who can represent the plaintiffs in these suits in either a class or individual capacity;

j. that to the extent the PLRA was intended to limit federal court access in prisoner rights cases, plaintiffs as prisoners wishing to bring a civil rights lawsuit in Michigan state courts must still raise a claim under the federal civil rights statute, 42 U.S.C. §1983 as Michigan courts have not yet ruled on whether a state analog to the federal civil rights act exists for Michigan prisoners;

l. that under the removal statute, 42 U.S.C. §1441, *et seq.*, a defendant may remove to federal court such a suit filed in a state court;

m. that in virtually every prisoner civil rights case initiated in Michigan state courts, the Michigan Department of Corrections, as well as its employees, have attempted to remove the case to federal courts;

n. that to the extent that the PLRA's fee provisions are intended to limit federal court jurisdiction over prisoner civil rights suits, it is not rationally related to this goal, as such claims may be, and routinely are, removed to federal courts regardless of the initial choice of venue that the plaintiff makes;

o. that the PLRA's fee provisions may limit federal courts' authority under their inherent equitable powers, as well as under the Federal Rules of Civil Procedure, by limiting the amount of fees and sanctions that may be imposed against a party by capping plaintiffs' counsel's hourly rates;

p. that to the extent that the PLRA's fee provisions limit federal courts' authority under these provisions they further violate the Equal Protection Clause of the United States Constitution by limiting the sanctions only in prisoner rights cases for contemptuous and/or sanctionable behavior.

(Plaintiffs' Motion for Reconsideration, Dec. 17, 1996, 3-4.) In short, plaintiffs present three possible intentions of Congress: 1) to limit frivolous prisoner lawsuits, 2) to have a positive impact on the judicial economy and efficiency of federal courts, and 3) to limit federal court access in prisoner rights cases. Since the attorney fee provisions are not rationally related to any of these goals, according to plaintiffs, the PLRA violates prisoners' equal protection rights.

I note that plaintiffs are contesting the action of Congress, not a state, and thus the Fourteenth Amendment is not at issue. Plaintiffs' rights to equal protection are merged into their Fifth Amendment right not to be denied a liberty interest without due process of law. "Although the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process." *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 173, n.8 (1980), *quoting Schneider v. Rusk*, 377 U.S. 163, 168 (1964).

To the extent that plaintiffs are correct in their analysis of Congress's reasons for including the attorney fee provisions in the PLRA, I agree that this law will ultimately have the opposite effect of their intended goal of curtailing frivolous lawsuits. As competent attorneys are forced to the sidelines by the fee diminution, more *pro se* lawsuits will take center court. Judicial resources will inevitably be squandered in an attempt to make sense of the *pro se* complaints that could have been more effectively marshalled and presented by counsel.

I am therefore reluctant to enforce this provision; however, my inquiry cannot focus on the wisdom of this provision:

> It is not the mission of this Court or any other to decide whether the balance of competing interests...is wise social policy.... [W]e cannot, in the name of the Constitution, overturn duly enacted statutes simply because they may be unwise, improvident, or out of harmony with a particular school of thought... Rather, when an issue involves policy choices as sensitive as those implicated here, the appropriate forum for their resolution in a democracy is the legislature.

Harris v. McRae, 448 U.S. 297, 326 (1979) (internal citations omitted). Since "Congress has neither invaded a substantive constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate governmental

interest. *Id.*

Congress possesses the power to limit the amount of fees allowed in a civil rights suit just as it possesses the underlying power to shift payment of fees to a prevailing party. Thus, there is no conflict with separation of powers principles. Furthermore, the PLRA's limitations on fees are rationally related to a legitimate governmental interest in limiting access to the coffers of the state. I therefore find that § 803(d)(7)(d)(3) of the Prison Litigation Reform Act does not violate prisoners' rights to equal protection under the laws.

III. CONCLUSION

ACCORDINGLY, IT IS ORDERED that plaintiffs' motion for reconsideration, for clarification, and for evidentiary hearing is denied.

IT IS SO ORDERED.

John Feikens
United States District Judge

Dated: Jan 31, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, *et al.*,

Plaintiffs,

vs.

PERRY JOHNSON *et al.*,

Defendants.
_____/

Case No.77-71229
Hon. John Feikens

Filed
Feb 6 3:32 PM '97

OPINION

I. BACKGROUND

In this motion, plaintiffs request costs for work performed on two appeals to the United States Court of Appeals for the Sixth Circuit and one petition for writ of *certiorari* to the United States Supreme Court.[1] Defendants have denied payment for these costs and fees on the basis that plaintiffs were not the prevailing party on these issues.

As a result of prevailing at trial, plaintiffs became entitled to fees and costs for work provided in this case pursuant to 42 U.S.C. §1988. It has long been established as the law of this case that plaintiffs do not need to be the prevailing party on each and every issue in order to be entitled to fees. Memorandum Opinion and Order, November 27, 1989, at 4; *Clover v. Johnson*, 934 F.2d 703, 715 (1991). The law of this circuit holds that plaintiffs are entitled to fees if the work performed by counsel was reasonably related to

[1] Specifically, these are identified as Sixth Circuit Appeals Nos. 95-1521 (Defendants' appeal regarding Defendants' Motion to Modify the Termination Language in the Remedial Plan) and 94-1617 (Defendants' appeal regarding contempt and access to courts for parental rights matters), and Supreme Court No. 95-1935 (Plaintiffs' petition for *certiorari* regarding contempt and access to courts for parental rights matters).

ensuring compliance with the judgment on which they originally prevailed: "Services devoted to reasonable monitoring of the court's decrees, both to insure full compliance and to ensure that the plan is indeed working.. .are compensable services. They are essential to the long-term success of the plaintiff's suit." *Northcross v. Board of Ed. of Memphis City Schools*, 611 F.2d 624, 637 (1979).

For reasons stated below, I conclude that these three appeals contested by defendants all involved issues reasonably related to monitoring compliance with the Remedial Plan entered in this case.

II. ANALYSIS

Two appeals (Sixth Circuit Appeal No.94-1617 and Supreme Court No. 95-1935) can be treated as one, for they both involve appeals of my order that defendants could not unilaterally terminate funding for legal assistance to prisoners in parental rights matters. Defendants argue that this issue was not reasonably related to the Remedial Plan and cite the reference in my opinion on this issue as a "a new issue" of "the constitutional right of female inmates to legal assistance and access in the area of parental rights." *Glover v. Johnson*, 850 F. Supp. 592, 592-93 (E.D. Mich. 1994).

In that same opinion, however, I explained at length how the right of prisoners to legal access on these matters was deeply rooted in the Remedial Plan and the consequent orders of this court:

> On January 6, 1992, defendants entered into a one-year contract with [Prison Legal Services to provide assistance in various areas including child custody, child visitation and parental neglect... This contract, and the services provided thereunder, was specifically entered into for the purpose of complying with this court's previous orders. Its *Statement of Purpose* is significant:
>
> Whereas the STATE desires to establish a system that will provide indigent female

> offenders currently incarcerated at the.. Facility with selected legal services as *ordered by the court* in *Glover v. Johnson*.

Id. at 594 (emphasis in original). I also noted that the contract specifically provided that legal services were to be provided for "domestic relations including divorce, child custody, visitation disputes, and child neglect actions;" and that such services had been provided to prisoners for years. *Id.* I therefore held defendants in contempt of this court's orders for unilaterally eliminating this assistance. Thus the issue of legal assistance in parental rights matters was directly connected with the Remedial Plan and the consequent orders of this court.

When faced with the termination of this assistance, plaintiffs raised a constitutional issue against such action. The originality of that argument does not detract from the reasonable relation it bore to monitoring defendants' compliance with the Remedial Plan. "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1982). Plaintiffs' counsel are therefore entitled to fees for work provided on these appeals.

The other appeal for which defendants are contesting fees (Sixth Circuit Appeal No.95-1521) involved defendants' motion to modify the provisions of the Remedial Plan dealing with the power of the court monitor and the termination of the plan. In essence, the relief sought amounted to a complete termination of the Remedial Plan. Work provided by plaintiffs' counsel on this issue was therefore critically related to monitoring compliance with the judgment, and plaintiffs are certainly entitled to fees on this issue.

III. CONCLUSION

Accordingly, plaintiffs' motion for settlement of post-judgment appellate fees and costs along with interest, is granted. Plaintiffs should submit to this court a recalculation of fees in the form of an order pursuant to this opinion.

John Feikens
United States District Judge

Dated: Jan. 31, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER. *et al.*,

Plaintiffs, Case No. 77-71229
vs. Hon. John Feikens

PERRY JOHNSON, *et al.*,

Filed
Defendants. Feb 6 3:32 PM '97

_____/

ORDER GRANTING DEFENDANTS' MOTION FOR APPROVAL OF DEFENDANTS' BOND STAYING JUDGMENT ON APPEAL

Defendants having filed a motion requesting that the Court approve a bond effecting a stay of the Court's December 4, 1996 Opinion and Order, and the Court having reviewed the pleadings;

IT IS HEREBY ORDERED that Defendants' motion is granted and that a surety for the total sum of attorney fees and costs bond be set in the amount of ten percent of the total sum of attorney fees and costs awarded in this Court's Opinion and Order of December 4, 1996;

IT IS FURTHER ORDERED that, upon Defendants' depositing with the Court such ten percent bond, this Court's judgment of December 4, 1996, which is currently on appeal be stayed.

John Feikens
United States District Judge

Dated: February 6, 1997

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1998 FED App. 0072P (6th Cir.)
File Name: 98a0072p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

_____

Mary Glover; Lynda Gates; Jimmie Ann Brown; Manetta Gant; Jacalyn M. Settles; and several Jane Does, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

Nos. 95-1521;
96-1852/1931/1948

v.

Perry Johnson, Director, Michigan Department of Corrections; Florence R. Crane; G. Robert Cotton; Thomas K. Eardley, Jr.; B. James George, Jr.; Duane L. Waters; The Michigan Corrections Commissions; William Kime, Director, Bureau of Programs; Robert Brown, Jr., Director, Bureau of Correctional Facilities; Frank Beetham, Director, Bureau of Prison Industries;

Richard Nelson,
Director, Bureau of Field Services;
Gloria Richardson, Superintendent,
Huron Valley Women's Facility;
Dorothy Costen, Director of
Treatment, Huron Valley Women's
Facility; and Clyde Graven,
Sheriff, Kalamazoo County;
individually and in their official capacities,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 77-71229--John Feikens, District Judge.

Argued: March 13, 1997

Decided and Filed: March 2, 1998

Before: WELLFORD, RYAN, and DAUGHTREY,
Circuit Judges.

COUNSEL

ARGUED: Susan Przekop-Shaw, Lisa C. Ward, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, for Appellants. Deborah A. LaBelle, LAW OFFICES OF DEBORAH LABELLE, Ann Arbor, Michigan, for Appellees. ON BRIEF: Leo H. Friedman, Kim G. Harris, Lisa C. Ward, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, for Appellants. Deborah A. LaBelle, LAW OFFICES OF DEBORAH LABELLE, Ann Arbor, Michigan, Michael Barnhart, Detroit, Michigan, for Appellees.

RYAN, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. WELLFORD, J. (pp. 52-56), delivered a separate opinion concurring in part and dissenting in part.

OPINION

RYAN, Circuit Judge. More than 20 years ago, two separate groups of plaintiffs brought class actions under 42 U.S.C. § 1983 on behalf of all female prison inmates in Michigan. Since then, almost all of the principal players, plaintiffs and defendants alike, have departed the scene through retirement, death, or release from prison. But the two cases live on, and judging from the arguments of the parties and the extensive opinions of the district court, we are not appreciably closer to a resolution than we were two decades ago and the end does not appear to be in sight.

In one of the two suits, which were consolidated by the district court, the plaintiffs challenged "the entire range of treatment programs for female prisoners including educational opportunities, vocational and apprenticeship training, prison industry and work pass programs, wage rates, and library facilities as compared to those offered to male prisoners," as violating the Equal Protection Clause of the Fourteenth Amendment. *Glover v. Johnson*, 478 F. Supp. 1075, 1077 (E.D. Mich. 1979). In the second case, the plaintiffs "claimed that their rights to equal protection and their right to access to the courts ha[d] been violated by [the State of Michigan's] failure to provide the female prisoners . . . an adequate law library comparable to those provided for male prisoners." *Id.* at 1094. After a lengthy trial, the district court found for the plaintiffs in both cases, entered a remedial "Final Order," and has been supervising these aspects of the Michigan women's correctional system ever since. During the course of the district court's supervision, we have entertained more than a dozen appeals; now, the case is before us once again. This time we are presented with three separate appeals which we have consolidated for decision. We are asked to review the district court's judgments (1) denying the defendants' motion to terminate the district court's oversight of the female inmates' educational and vocational opportunities and their access to the courts; (2) granting, in part, the plaintiffs' motion to impose contempt sanctions against the defendants; and (3) granting the plaintiffs' motion for attorney fees.

For reasons we will fully explain, we conclude that the judgment of the district court in the first appeal, concerning termination of judicial oversight, must be vacated, and the matter remanded for further proceedings. We will retain jurisdiction. The district court's judgments imposing contempt sanctions and attorney fees will be affirmed in part and reversed in part, and these matters too will be remanded for further proceedings, but as to these, we will not retain jurisdiction.

I.
INTRODUCTION

Despite the district court's patient, dedicated, and persistent effort over the long history of this lawsuit, it has been unable to accomplish the two tasks before it: (1) achieving compliance on behalf of Michigan's women prisoners with Fourteenth Amendment equal-protection guarantees and with First Amendment access-to-court guarantees, and (2) terminating the federal-court supervision of Michigan's women's prison system. The first of these tasks, of course, is also the plaintiffs' goal in filing this lawsuit; it became the district court's task when the plaintiffs prevailed on the merits in 1979. The second task, on the other hand, is simply a necessary corollary to any extended federal-court oversight of State matters.

With all due respect, we believe the district court's inability to achieve these two tasks stems in large part from the court's loss of proper perception regarding its role. Very substantially because of unfocused and misdirected advocacy by both sides in this litigation, and particularly because of the recalcitrant defendants' foot-dragging, the district court has been preoccupied with attempting to force the defendants to comply with the details, even the minutiae, of the intermediate methodologies the court has devised for remedying the constitutional deficiencies it found in 1979. The court has lost sight of the forest for its long-time attention to the trees.

We write today not only to decide the specific questions presented by these appeals, but also to clarify the district court's dual missions and, in the process, refocus the attention

of all concerned on the tasks at hand: remedying the constitutional infirmities the district court found existed in 1979, and terminating this litigation as speedily as possible.

II.
BACKGROUND

The protracted history of this case has been sketched on many occasions in the published opinions of the district court and this court. In lieu of still another detailed recitation, we will restate only those facts necessary to an understanding of these consolidated appeals, and leave the reader to the multiple other opinions in order to fill the interstices. But that having been said, in order to afford the reader an adequate understanding of the basis for our decision today, we must nevertheless burden this opinion with a rather extensive review of the district court's orders and the parties' efforts at complying with them.

In 1979, the district court conducted a 10-day bench trial, after which it issued a lengthy opinion holding both that "[s]ignificant discrimination against the female prison population occurs in several areas of programming . . . in violation of the Fourteenth Amendment," *id.* at 1083, and that the prisoners' right of access to court was impeded not because there was no law library one was provided and it was adequate but by the need for legal training, see *id.* at 1097. Two years later the court's judgment was supplemented with a "Final Order," which the district court characterized as "the culmination of lengthy negotiations" between the court and the parties, and which set forth in considerable detail the required remedial actions. See *Glover v. Johnson*, 510 F. Supp. 1019, 1020 (E.D. Mich. 1981). The court also stated its intention to "retain[] jurisdiction until it is satisfied that the terms of the Orders have been complied with in all respects." *Id.* The defendants did not file appeals to this court from either the 1979 judgment or the 1981 "Final Order."

For seven or eight years following the issuance of the Final Order, the parties were repeatedly before the district court, and before this court a number of times, debating the efficacy of the district court's order seeking to achieve the constitutionality it found lacking in 1979, and the propriety of

several of the district court's enforcement methodologies. With each passing year the district court became increasingly less satisfied with the defendants' compliance.

Ultimately, but certainly not finally, in 1989, the district court issued a lengthy opinion and order, surveying the defendants' "unwillingness or inability to make progress towards implementing the programs ordered" at earlier stages of the case, and noting that the defendants had consistently "met the use, and threatened use, of [the district court's] contempt power with studied indifference." *Glover v. Johnson*, 721 F. Supp. 808, 812, 811 (E.D. Mich. 1989). The court made detailed findings with respect to the defendants' progress in six areas. The first area was access to the courts, and the remainder were five subcategories of rehabilitative programming: educational programming, vocational programming, apprenticeships, prison industry, and work-pass programs. It concluded that the defendants' efforts fell short of the mark. The court stated:

> In October 1979, I found the rehabilitative programming then afforded to the Department's female prisoners to be substantially inferior to that offered its male prisoners. I entered an order outlining the required remedy. In 1981, I supplemented that outline with a more detailed decree. That decree was captioned a "Final Order." Now, ten years later, female prisoners are still not receiving the type of equal programming to which they are entitled. As recounted . . . , the Department has failed to implement my orders in almost every respect.

Id. at 849. Therefore, the court imposed a specially crafted contempt remedy providing for the appointment of a Special Administrator and a Compliance Monitor, which it felt represented the best hope of attaining the "elusive" goal of parity. *Id.*

The defendants appealed this order, but without notable success. In May 1991, this court issued its decision in *Glover v. Johnson*, 934 F.2d 703 (6th Cir. 1991), holding, among other things, that

> the district court did not abuse its discretion in holding defendants in contempt for non-compliance with the court's 1981 order. We also conclude that the district court's order requiring defendants to appoint a special administrator to develop a remedial plan is not an excessively intrusive remedy.

Id. at 705. We elaborated: "The district court did not abuse its discretion in requiring defendants to appoint an administrator to develop the remedial plan," especially in light of the fact that "[t]he history of this case shows a consistent and persistent pattern of obfuscation, hyper-technical objections, delay, and litigation by exhaustion on the part of the defendants to avoid compliance." *Id.* at 715.

Following this decision, the district court appointed Nancy L. Zang to serve as "Special Administrator of Female Offender Programs," and Dr. Rosemary Sarri to serve as Compliance Monitor. In December 1991, the defendants submitted to the district court a Remedial Plan and a Plan for Vocational Programs and Work Pass, both of which plans had been prepared by Zang at the direction of the district court. The plans assertedly were "intended to assure the constitutionality of the programs provided to female offenders at Crane Correctional Facility, Huron Valley Women's Correctional Facility, Scott Correctional Facility, and Camp Gilman." These institutions, at the time, comprised all of the prison facilities for women in Michigan, although the number, size, and character of the female inmates' facilities have since changed. The plans summarized the court's previous orders, as well as the actions already taken and those proposed by the defendants, and set forth a "project tracking system to facilitate an ongoing review and evaluation." The Remedial Plan contains the following language with respect to implementation, compliance, and termination:

> Implementation
>
> Defendants shall implement this remedial plan in accordance with its terms on or before two (2) years from the date of its approval by the

Court.

. . . .

Compliance Monitor

Defendants shall monitor the binding provisions of the Remedial Plan. Defendants shall file with the Court and serve upon the Court Monitor and Plaintiffs' counsel quarterly monitor reports until the filing of the final monitor report described herein. The monitor reports shall include the compliance status and the progress of each binding provision set forth in this remedial plan.

Within one hundred and twenty (120) days of the expiration of the two (2) year implementation period, Defendants shall file with the Court and serve upon the Court Monitor and Plaintiffs' counsel a final monitor report describing the compliance status of each binding provision set forth in this remedial plan. After filing of the final report, monitoring of the remedial plan shall terminate.

Termination

Defendants shall be in substantial compliance where 75% or more of the binding provisions in each program area set forth in this remedial plan are found in compliance in the final monitor report. Where the final monitor report reflects substantial compliance with the binding provisions in one or more program areas, the jurisdiction of the Court shall be terminated for each of the compliant areas thirty (30) days from the filing of the final monitor report, unless Plaintiffs file a Motion requesting extension of the Court's jurisdiction due to existence of constitutional violations with the program areas set forth in this remedial plan.

The Plan for Vocational Programs and Work Pass contains similar language.

The Remedial Plan proposed the following actions for the following areas, along with a proposed time line for achieving the goals:

Access to the Courts: establish paralegal trainee pay scale; law library status reports due; continue Huron Valley Women's Facility/ Jackson Community College paralegal program; contract and deliver training through Kellogg Community College; contract and deliver training through University of Detroit-Mercy; implement eligibility criteria; and establish a method to determine if a sufficient pool of writ writers exists.

Educational Programming: assessment develop guidelines, train staff; planning develop individualized program plan (IPP) guidelines, design IPP, train staff; develop IPPs for women in associate and baccalaureate degree programs; education files develop standards; develop postsecondary criteria for enrollment/ participation; develop information process; develop procedures for course/degree selection; continue associate and baccalaureate programs at Crane; continue associate program at Scott; begin baccalaureate programming at Scott; establish Jobs Education and Training Council.

Apprenticeships: determine program viability at Crane Women's Facility and Scott Correctional Facility; seek court approval for apprenticeships at Crane, Scott, and Huron Valley; modify Joint Apprenticeship and Training Committee at Crane if necessary; establish Joint Apprenticeship and Training Committee at Scott; modify/prepare standards at Crane and Scott; inform, recruit, select and implement apprenticeships at Crane and Scott; determine viability for Huron Valley apprenticeship trans-

> fer to Scott; develop plans/paperwork relative to Huron Valley closing; and develop monitoring scheme.

The precise goals for vocational and work-pass programs are as follows:

> Vocational Programs: Review and update curricula; develop guidelines for prerequisite skills; develop IPPs for all vocational students; develop offender profile; design and conduct vocational interest survey; identify viable vocational programs; and develop strategies and implement new programs.
>
> Work Pass: Simply proposes that the work pass program "will continue to be offered," with no modifications, because as of December 2, 1991, 29% of eligible women participated, compared with only 12.3% of eligible men.

Nowhere in the plans was there any mention of the rehabilitative educational- or occupational-training opportunities then being provided to male inmates, the criterion against which the district found a denial of equal protection 12 years earlier.

The plaintiffs objected to the plans on the grounds that they (1) failed to address issues that were part of the court's prior orders; (2) failed to include proposals to remedy constitutional violations found by the court in its 1989 order; and (3) failed to fully explain the defendants' plan to remedy the issues that were addressed. The defendants apparently responded to the plaintiffs' objections, but never revised their plans. They never, moreover, sought court approval of their plans. And most significantly, the district court never entered an order adopting the proffered plans.

A.
Motion to Terminate

In December 1993, the defendants filed a motion pursuant to Fed. R. Civ. P. 60(b)(5), seeking to modify the

compliance-monitor requirement and the termination language contained in both plans, even though neither had ever been the subject of court approval. Specifically, the defendants sought to change the existing termination language to provide that upon "court approval of the Remedial Plan, or any portion of the Remedial Plan, an order will immediately be entered terminating the court's jurisdiction over the applicable provisions."

The district court then held numerous days of hearings, attempting to ascertain the extent of the defendants' compliance. In March 1995, the district court issued its opinion denying the defendants' motion. See *Glover v. Johnson*, 879 F. Supp. 752 (E.D. Mich. 1995). The district court stated:

> [D]efendants' motion, in reality, seeks to terminate the Plans and to end the role of the Court Monitor. Thus, defendants seek to terminate the case itself. Defendants believe that implementation and monitoring of the Plans have been ongoing; therefore, there is no need for a compliance monitor, and no need to monitor defendants' conduct. Defendants believe the monitoring and reporting requirements outlined in the current Plans, in addition to what defendants have already been subject to during the pendency of approval of the Plans, substantially burden them. They argue that the motion should be granted because they have "substantially complied" with this court's previous orders and with the Remedial Plan and the Plan for Vocational Programs and Work Pass.

Id. at 755-56 (footnote omitted). The court then characterized the defendants' position as follows:

> Defendants argue that the court's active participation in the implementation and monitoring of defendants' compliance with the Plans constitutes changed factual circumstances which make compliance with the Plans more burdensome. Additionally, defendants assert

> that they did not anticipate that the following acts would take place prior to approval of the Plans: (1) that the court would give permission to implement the Plans while indefinitely delaying approval; (2) that they would be required to submit status reports and respond to numerous inquiries from plaintiffs' counsel; and (3) that the court would become involved in the implementation and monitoring of the Plans.

Id. at 756 (footnote omitted).

In deciding the motion, the district court first noted that Fed. R. Civ. P. 60(b), the rule under which the defendants made their motion, "is applicable only to final judgments and orders," and that the plans "are neither." *Id.* Nonetheless, the court reasoned, it could responsibly "adopt[] a substitute approach," and simply "assum[e] that the Plans had been de facto approved," and then "determine if defendants are currently in compliance with the Plans." *Id.* In that case, the requested modifications could be made if "the changed factual circumstances advanced by defendants warrant modification." *Id.* at 757.

The court conducted a review of the terms of the plans, and determined that the defendants were not in substantial compliance, and therefore denied the defendants' motion. We will paraphrase the district court's specific comments, as follows:

> 1. With respect to access to court, the court identified the following "deficiencies": "[N]o method has been developed to determine whether there exists an adequate pool of writ-writers in the prisons. Additionally, information is still lacking about the adequacy of writ-writers and their utilizations. . . . [T]here is no library currently at Camp Gilman nor a paralegal."
>
> 2. With respect to educational programming, the court observed: "[T]here still are women in

> college programming who do not have IPP's prepared. Additionally, there are a number of women who are prevented from taking a full twelve-credit course load because of space problems."
>
> 3. With respect to apprenticeships, the court identified five programs at Crane, and six at Scott, and noted the defendants' arguments that "they have not been able to fill three of the five Crane apprenticeships due to eligibility requirements," which have excluded approximately 100 women. Placing the blame on the defendants for this inability, the court concluded that the defendants "are clearly not in substantial compliance with the goals of apprenticeship programming as established in the Remedial Plan. Under the Plan, defendants are required to recruit and motivate women to participate in apprenticeship programming." The court suggested that the eligibility criteria employed by the defendants "may discourage women from even applying for apprenticeships."
>
> 4. With regard to vocational programming, the court characterized its earlier orders as requiring the defendants "to provide vocational programs at all facilities housing members of the plaintiff class." The court observed: "[A]s of June 1, 1994, there were eligible inmates who were not enrolled in vocational programming due to waiting lists. Additionally there are a significant number of women in camps who are not receiving vocational programming although their earliest release dates are more than a year away."
>
> 5. With regard to work-pass programs, the court found that "[t]here are currently no women being taken out on work pass." Moreover, the court found, "[t]here has been a continued decrease in the number of women

> going out on community residential placement," a "program [that] was structured to take the place of work pass." Finally, the court observed, work pass "programming is significantly reduced because of more stringent security requirements," and the defendants "have not proposed alternative programming to work pass" in recognition of this reduction.

Id. at 757-59 (footnotes and citations omitted).

Notably missing from the district court's lengthy opinion is any consideration whether, at the time the opinion was written, the educational, vocational, apprenticeship, and work-pass opportunities then being offered to women inmates were on a constitutional par with those then being offered to men. The court's overall conclusion with respect to the defendants' motion was that "[a]lthough defendants have made significant improvements in a number of areas . . . , they have not substantially complied with either of the Plans as a whole." *Id.* at 759-60.

To the district court's credit, it concluded its opinion with a discussion of "finality in these proceedings." *Id.* at 760.

> The perplexing issue is: How is finality reached in these public agency-public law cases? . . .
>
> As it is so often a need in the administration of justice, a balance must be reached. That balance is reached, it seems, when there is substantial compliance with the goals of . . . a negotiated settlement . . . . [T]hat requirement of compliance has not yet completely been reached. That fact may not be used, however, to avoid addressing finality. Even though progress has been slow . . . , there has been substantial progress toward finality.
>
> It is this court's view that a further test period is still required. That test period can be measured in a discrete time frame.

> This court, with the aid of its Monitor[], will determine within a period of sixty (60) days after December 31, 1996, whether compliance has been substantially accomplished. During the period prior to December 31, 1996, . . . the monitor[] will perform quarterly reviews which will be submitted to the court and the parties detailing the compliance status in each program . . . .

Id. (footnote omitted).

In April 1995, the district court entered the following order, pursuant to its March opinion:

> IT IS HEREBY ORDERED that Defendants' Motion to Amend or Modify the Compliance Monitor and Termination Language in the Remedial Plan and the Plan for Vocational Programs and Work Pass and Defendants' request to terminate the role of monitors and Court jurisdiction is DENIED;
>
> IT IS FURTHER ORDERED that until December 31, 1996[,] the Court Monitor shall submit quarterly reports detailing the status of Defendants' compliance with Court orders and the Plans to the Court and the parties;
>
> IT IS FURTHER ORDERED that within sixty (60) days after December 31, 1996[,] the Court, with the aid of the Monitor, shall determine whether compliance with Court orders and the Plans has been substantially accomplished through this procedure:
>
> 1. The Court would first review compliance under the Plans and would dismiss any portions of the Plans for which it found compliance.
>
> 2. The Court would entertain motions regarding the portions of the

> Plans for which the Court did not find compliance. In these motions the parties could argue the relevant constitutional standards and show that compliance with the full terms of the Plans should not be required.

From the April 1995 order, the defendants filed this timely appeal. Before discussing our conclusions with respect to this, the first of the three matters before us, we turn to the background underlying the second matter on appeal, the contempt proceedings.

B.
Contempt Proceedings

Following the district court's denial of the defendants' request for termination of the court's jurisdiction, the plaintiffs filed a number of motions claiming that the defendants were in contempt for their alleged continuing, and escalating, failure to comply with various district court orders. At first the district court declined to consider these contempt motions while it experimented with a "compliance committee" consisting of the Special Administrator, the wardens of the Crane and Scott facilities, a representative from the plaintiff class, and the Compliance Monitor. In January 1996, however, it abandoned the experiment, due to the "substantial resistance" of the defendants. The district court then scheduled another round of evidentiary hearings in connection with the still-pending contempt motions. Following the hearings, the court issued a lengthy opinion and order imposing contempt sanctions on the defendants because of their failure to comply, in several respects, with its earlier orders.

1.
a.
Access to the Courts

Addressing first the matter of the female inmates' right of access to the courts, the district court concluded that its "remedial orders requiring Defendants to provide Plaintiffs adequate access" were "embodied in the remedial plan" devised by the defendants in 1991. *Glover v. Johnson*, 931 F.

Supp. 1360, 1363 (E.D. Mich. 1996). The court described the pertinent portions of the remedial plan as follows:

> It provides, in conjunction with [a] Department of Corrections Policy Directive . . . , that all general population prisoners shall be entitled to use the main law library at each correctional facility for a[t] least six hours each week. It also requires Defendants to provide paralegal training "until such time as a sufficient pool of trained legal assistants is developed." Finally, the Defendants are required to establish a method to determine when a sufficient pool of inmate paralegals exists to meet the needs of the prisoner population.

Id. at 1363-64 (citations omitted).

In their motion requesting that the defendants be held in contempt, the plaintiffs argued that the defendants were denying adequate access to the courts for prisoners assigned to custody levels I, IV, and V at Scott. The defendants responded that any limits on library and legal-assistant use were "justified by legitimate security concerns." *Id.* at 1364. The district court rejected the defendants' arguments, and concluded that the defendants "denied, in violation of the orders of this Court and the Constitution, level I, IV, and V prisoners at [Scott] meaningful and effective access to the courts." *Id.* at 1367. The court noted that the defendants did "not deny that their denial of level I and level V prisoners access to [the main] law library is contrary to the remedial plan," but instead "argu[e] that they had a legitimate penological interest for their actions and that they have provided adequate alternative means of access." *Id.* This, the court held, was insufficient to cure their contempt, because it was not within the defendants' province to unilaterally alter a provision of the remedial plan. The court also rejected the stated security concerns of the defendants, opining first that the security concerns alone did not render it impossible to provide meaningful access to the courts, and second, that while "[p]rison security is unquestionably a legitimate penological interest," the defendants' "refusal to allow level I and V prisoners access to the main law library does not bear a

rational connection to prison security," in the absence of evidence that Level I prisoners have proven historically to be a security threat. See *id.* at 1370.

b.
Vocational Programming

The district court next turned to the defendants' actions with respect to vocational programming. The court observed that its prior orders required the defendants to provide six vocational programs at Scott. The plaintiffs' position in their contempt motion was that the defendants "ha[d] unilaterally discontinued court ordered vocational programming," and that they "den[ied] programming to prisoners at [Scott] on the basis of custody level." *Id.* at 1372.

The district court found that the defendants had discontinued three vocational programs auto mechanics, building trades, and institutional maintenance; that Level I inmates had systematically been denied vocational programming; and that particular Level IV and V inmates had in the past been denied vocational programming, but that the defendants' "prerequisites for prisoner participation in vocational programming do not presently discriminate based upon custody level." The court then concluded that the defendants were "in contempt of [the district court's] orders requiring six vocational programs" at Scott because they were only providing four programs, and further that the defendants had "denied court ordered programming to level I, IV and V prisoners based upon their custody level." *Id.* at 1373, 1376. With regard to the latter conclusion, the court noted that the defendants themselves admitted denying programming based on custody level, but argued that this was justified because of security concerns. The district court rejected this argument, again stating that the segregation policy "does not mandate denial of programming," and also noting that the policy itself includes an exemption for vocational programming. *Id.* at 1376. The court concluded, however, that the defendants had purged themselves of contempt in this particular regard by no longer denying programming based on custody level.

c.
Camp Branch

The court next turned to allegations regarding Camp Branch. There, the plaintiffs' allegations related to the defendants' failure to provide "off-grounds programming" that is, public works and work-pass programs to camp inmates, and to the defendants' alleged denial of access to "educational, vocational, and apprenticeship programming." The court asserted that its "1979 order and . . . 1981 orders required Defendants to provide work pass and public works programming at all prisons and camps housing members of the plaintiff class." *Id.* (emphasis added). It further noted that while the defendants are not required to provide vocational, apprenticeship, or college programming at camp facilities, it has nonetheless "been the long-standing commitment of Defendants that qualified prisoners who are placed in the camps may transfer to a facility providing court ordered educational, vocational, and apprenticeship programming not available in the camp." *Id.* (emphasis added).

The district court found that the defendants were "in contempt of several . . . orders concerning camp facilities," as follows: (1) by not providing a work-pass and public-works program until after the plaintiffs filed a motion to compel; (2) by not permitting the transfer of "eligible prisoners at Camp Branch who request vocational, apprenticeship, or prison industry programming to a facility which provides these programs"; and (3) by transferring new inmates directly to camps without allowing them to enroll in programming or testing them for eligibility. *Id.* at 1378.

d.
Apprenticeship Programs

Finally, the district court addressed apprenticeship programs. The court stated that the remedial plan obligated the defendants to provide five "meaningful" apprenticeships at Crane, as well as to actively "recruit prisoners for the apprenticeships." *Id.* at 1379. The court also relied on a 1993 order for the proposition that "[t]he mere posting of apprenticeship openings was . . . insufficient," and the defendants were instead "specifically required to assist in

motivating inmates to apply for apprenticeships." *Id.*

The district court concluded that the defendants were in contempt of the remedial plan for failing to provide "the quantity [and] the quality of apprenticeships that [the district court] ha[d] ordered." *Id.* at 1382. With regard to quantity, the defendants had never filled one apprenticeship, electrician maintenance, and two others, landscape gardener and building maintenance, were filled "[i]n a manifest scramble," only after the plaintiffs filed a contempt motion. Further, it specified, "not one inmate has completed an apprenticeship at Crane since they were first ordered." *Id.* (emphasis omitted). With regard to quality, the court concluded, the amount of on-the-job training was insufficient and the teaching was "uneven." *Id.* at 1383.

2.
Sanctions

The district court then turned to the question of appropriate sanctions, and concluded that there was "no alternative to stimulate compliance but to impose significant monetary contempt sanctions." *Id.* at 1384. It therefore imposed a $500-per-day fine for contempt in connection with each of (1) access to the courts; (2) vocational programming; and (3) apprenticeship programs, for a total of $1500 per day, until the attainment of compliance. These fines were set to increase in approximately two-and-a-half months, to $5000 per day for each violation, for a total of $15,000 per day.

The defendants filed another appeal, and, following the defendants' contemporaneous motion, we stayed the district court's order.

III.
ANALYSIS

With that background, and before taking up the third matter on appeal attorney fees we turn now to our discussion of the termination of federal-court supervision and contempt issues.

A.
Motion to Terminate

In its initial 1979 decision, the district court appears to have recognized the extraordinary and sensitive nature of its undertaking:

> The possibility of judicial intervention in matters of State concern must be approached cautiously. Given the typical complexity of the problems in operating a prison system, a policy of deference to the decisions of responsible State officials is required.

Glover, 478 F. Supp. at 1079. And the court correctly identified the remedial goal to be achieved in this litigation parity in the treatment of male and female prisoners:

> The term "parity of treatment" describes concisely the standard to which . . . the State ought to be held in its treatment of female prisoners. In other words, Defendants here are bound to provide women inmates with treatment and facilities that are substantially equivalent to those provided the men[,] i.e., equivalent in substance if not in form unless their actions . . . bear a fair and substantial relationship to achievement of the State's correctional objectives.

Id. (emphasis added).

We conclude that in the course of its supervision of this litigation, the district court has lost sight of the standard it correctly identified in 1979 and, perforce, has lost sight of its goals. To reiterate, those goals are (1) remedying constitutional infirmities through achieving parity of treatment for men and women and ensuring access to the courts for women, and, as soon as that is accomplished, (2) terminating federal judicial involvement.

As an initial matter, we note that to approach the issues before us in any straightforward manner is difficult, because

the case comes to us as a morass of procedural irregularity and the parties' obfuscation of the issues. The defendants' characterization of their motion below as a request for Fed. R. Civ. P. 60(b) relief, and their evasiveness as to what, precisely, is the underlying judgment the district court was being asked to review is only the beginning of the procedural imprecision that has burdened the district court's action as well as our own. One complication we face is that it is unclear whether the remedies for the unconstitutional conditions of confinement the district court found have been set forth in (1) a consent decree or in (2) a court-imposed judgment following full litigation. This inquiry is critical; whether it is one or the other determines the appropriate standard for termination of federal-court oversight, and the standards are not the same. *Compare Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) with *Knop v. Johnson*, 977 F.2d 996 (6th Cir. 1992). If the defendants' Rule 60(b) motion was addressed to the 1981 Final Order, we are faced with the parties' dispute as to whether the Final Order is a consent decree. But if the defendants' motion is instead addressed to the remedial plans, a position that both parties adopt and abandon at various instances in their briefs, we are faced with still another problem: the plans were never approved by the district court, and thus were not "final judgment[s] [or] order[s]" under Rule 60(b). We are left to consider, then, the effect of the district court's *ipse dixit* that the remedial plans were "de facto" approved at the time it denied the Rule 60(b) motion.

Although the parties have failed to definitively articulate which of the several "documents" considered by the district court is the appropriate subject of our analysis, we find it possible to bypass that inquiry. We conclude that in no event is any of the underlying documents a "consent decree" that could hold the defendants to a higher compliance standard than what is otherwise constitutionally mandated. First, considering the 1981 Final Order, we see nothing in the record to suggest it is a consent decree. The district court has never labeled it as such and the parties are unable to agree that it is. And we note that while there may have been negotiations among the district court and the parties about the precise terms of the 1981 Order, that alone does not transform it into a consent decree. Instead, all indications are that it was imposed on the defendants after their fully litigated defeat.

Considering next the remedial plans, we conclude that these cannot be consent decrees for two reasons: (1) as the plaintiffs themselves stated, they were objected to by the plaintiffs, and (2) they were never adopted by the district court as its own order prior to its decision declining to amend them.

We proceed, then, from the premise that the defendants' actions are not constrained by a consent decree, but rather, by an order of the district court to which the defendants have never consented. That being so, our standard of review of the district court's denial of the defendants' motion to terminate judicial oversight is whether the constitutional violations the district court found in 1979, denial of "parity of treatment . . . of female prisoners" and denial of constitutionally mandated access to the courts, continue to exist today. The district court and the parties have failed to attend to this question; in fact, it is not directly the question that the defendants have put to us in this appeal. It is, however, the question we must necessarily answer in order, in turn, to answer the question the defendants have asked: whether the district court's supervision of this suit should be terminated. Unfortunately, the attention of all concerned the district court, the parties, and this court as well has been consistently misdirected to an inquiry into whether the state has complied with the details every jot and title of the requirements of the remedial plans and the district court's multitudinous orders.

To some degree, this misdirection is understandable. It was necessary for the district court, once it found constitutional violations, to develop a specific methodology by which constitutional compliance could be attained and maintained. The intermediate steps it has devised to achieve the compliance, however, have become the focus of everyone's attention; the ultimate goal toward which those compliance measures have been directed appears to have been largely ignored. "Getting there" has obscured where "there" is.

The lengthy pendency of this case has resulted in monumental changes in circumstances. Not only have most of the named parties departed the scene, but there have been altered educational opportunities for all inmates, changes in custodial philosophies and facilities, and shifting and evolving

educational and occupational interests. The court system, necessarily a slow-moving and even ponderous institution, is ill-equipped to adapt itself to this lack of stasis. In its understandable frustration with the problems surrounding compliance with the extensive details of its many orders and plans, the district court has imposed still more obligations on the defendants, and compliance has become a moving target.

Properly conceived, the district court's mission need not be so elusive. Its duty is not to develop a minutely detailed program for the women's prisons and to enforce every facet of its terms. It is a truism that "[j]udicial oversight over state institutions must, at some point, draw to a close." *Johnson v. Heffron*, 88 F.3d 404, 407 (6th Cir. 1996). The challenge, it appears, is to remember that terminating judicial oversight is an objective to be affirmatively strived for, not simply an event that we welcome if it happens to occur. *Cf. Missouri v. Jenkins*, 515 U.S. 70, 88-89 (1995).

To restate the matter for purposes of emphasis, the federal court's authority the district court's and this court's to intrude itself into the operation of Michigan's prison system is limited to assuring (1) that sufficient parity is achieved between male and female inmates in matters of educational and vocational opportunities as satisfies the demands of the Equal Protection Clause of the Fourteenth Amendment, and (2) that female inmates have the level of access to the courts that is constitutionally required under the First Amendment. See *Lewis v. Casey*, 116 S. Ct. 2174 (1996). Consideration of whether these ultimate goals have been accomplished has been notably absent from the district court's pronouncements and the parties' advocacy. But without a definitive finding by the district court as to these matters, we are simply unable to assess whether, as the defendants assert, it is now proper to terminate federal-court intervention. *Cf. Rufo*, 502 U.S. at 389.

All involved in this litigation must bear in mind that the details of the district court's remedial plans and orders are not ends in themselves; they are only a means to an end. If the defendants can demonstrate that they have remedied the constitutional violations found in 1979, even without compliance with the details of previous orders or plans, they must be permitted to do so. And if they do so, federal-court

oversight must terminate. But that is not to say that if the State has culpably failed to comply with particular district court orders, it should not be held accountable through contempt proceedings. Validly entered court orders, even if later shown to be unnecessary, must be obeyed, under pain of contempt.

We wish to cut the Gordian knot presented by this aging litigation, but to do so, we must be presented with sufficiently detailed findings of fact and conclusions of law addressing whether the defendants have achieved the parity of educational and vocational opportunity and the requisite access to court that the district court found lacking in 1979. Therefore, we must remand to the district court for further proceedings, and shall mandate the following.

Within 120 days following issuance of this opinion, the district court shall conduct hearings and receive evidence, including stipulations by the parties, in order to determine with particularity the educational, vocational, apprenticeship, and work-pass opportunities presently being provided (1) to male inmates and (2) to female inmates in the Michigan correctional system. The district court will then make particularized findings of fact and conclusions of law determining whether the male and female inmates are presently being provided sufficiently comparable education, vocational, apprenticeship, and work-pass opportunities as to satisfy the requirements of the Equal Protection Clause of the Fourteenth Amendment. In undertaking this task, the district court must take into account the present conditions of custody and population size at various institutions; any differences in educational and vocational interests between male and female inmates; available educational and vocational training resources; and such other considerations as the district court may deem appropriate. To the extent that, on the basis of such findings of fact and conclusions of law, the district court finds compliance with the Equal Protection Clause of the Fourteenth Amendment, it will terminate its exercise of jurisdiction over the defendants as to those matters. Should the court determine, however, that the requirements of the Equal Protection Clause of the Fourteenth Amendment are not being met as to any of the foregoing, it will explain its reasons for such conclusion and it will identify with particularity the

measures it deems necessary to assure equal protection for female inmates.

Next, the district court must also, within the same period of time, conduct hearings and receive evidence, including stipulations by the parties, to determine with particularity whether female inmates are presently being denied access to court as guaranteed by the First Amendment, as that entitlement is authoritatively interpreted by the Supreme Court in *Lewis v. Casey*, 116 S. Ct. 2174. Should the court determine that the requirements of the First Amendment are not being met, it will explain its reasons for such conclusion, and it will identify the particulars in which female inmates are being denied the access to court that is required by the Constitution, and likewise identify with particularity the measures it deems necessary to assure that such access is given.

The district court's findings of fact and conclusions of law will be reduced to writing and filed with this court not later than 150 days following the date of issuance of this opinion.

We retain jurisdiction as to this aspect of the case.

B.
Contempt Proceedings

We turn now to the second of the matters appealed, the contempt sanctions imposed by the district court, which we review for an abuse of discretion. See *Glover*, 934 F.2d at 710.

> In a civil contempt proceeding, the petitioner must prove by clear and convincing evidence that the respondent violated the court's prior order.
>
> A litigant may be held in contempt if his adversary shows by clear and convincing evidence that "he violate[d] a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of

> the court's order."

Id. at 707 (citation omitted). It is the petitioner's burden here, the plaintiffs' to make a *prima facie* showing of a violation, and it is then the responding party's burden to prove an inability to comply. See *Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir. 1995). This court has explained:

> [T]he test is not whether defendants made a good faith effort at compliance but whether "the defendants took all reasonable steps within their power to comply with the court's order."
>
> [G]ood faith is not a defense to civil contempt. Conversely, impossibility would be a defense to contempt, but the Department had the burden of proving impossibility, and that burden is difficult to meet. Although diligence is relevant to the question of ability to comply, the Department's evidence of diligence alone does not satisfy that burden.
>
> "[I]nability to comply would be a defense . . . but defendants would be expected . . . to show this 'categorically and in detail.'"

Glover, 934 F.2d at 708 (citations omitted).

1.
a.
Access to Court

The district court's finding of contempt and imposition of sanctions with respect to the defendants' failure to meet the district court's requirements for assuring the plaintiffs' access to the courts must be reversed. The court's findings were based entirely on the defendants' failure to comply with the terms of the remedial plans. The existence of a "definite and specific order" that has been disobeyed is a prerequisite to the imposition of contempt sanctions, *Glover*, 934 F.2d at 707, and the remedial plans simply do not satisfy that requirement. Even if it may be assumed, *arguendo*, that the district court

effectively adopted the remedial plans at the time it denied the defendants' motion to terminate, it did not, and could not, do so *nunc pro tunc*. Thus, at the time of the defendants' alleged "violations" of the remedial plans, the remedial plans were not orders of the court. Therefore, the defendants were not in contempt by failing to adhere to their terms.

b.
Vocational Programming

According to the district court there was only one basis for imposing sanctions with respect to its findings that defendants failed to provide adequate vocational programming: reduction in programs from the required six to four. The defendants argue that the district court had been ambiguous about how many vocational programs it would require. We do not agree. The district court was repeatedly explicit that it required six separate vocational programs for female inmates. The record is equally clear that the defendants offered only four programs. See *Glover*, 931 F. Supp. at 1373. Therefore, this aspect of the district court's contempt judgment is affirmed.

c.
Camp Branch

The district court found the defendants in contempt and imposed sanctions in part due to the defendants' failure to comply with the requirements of the court's 1979 order concerning off- grounds programming at the women's prison camp. The district court was mistaken; in 1979 Michigan did not have any prison camps for women. See *Glover*, 478 F. Supp. at 1093-94. In 1981, however, the district court did order that "educational programs shall be available to women inmates at [camps] on the same basis as available at camps housing male inmates." *Glover*, 510 F. Supp. at 1024 (emphasis added). However, it never mentioned off-grounds programming for Camp Branch. The defendants are not, therefore, in contempt for failing to provide a work-pass or a public-works program.

The district court also faulted the defendants for not permitting transfers upon request of Camp Branch prisoners to

facilities that provide vocational, apprenticeship, or other similar programming. This is not a proper basis for a contempt sanction, however, because by the district court's own reasoning, the defendants were not required to do so by court order; it had simply been their "long-standing commitment." *Glover*, 931 F. Supp. at 1376. Likewise, the defendants are not subject to sanctions for putting new inmates directly into camps without allowing them to enroll in programming, as this too was never a court-ordered requirement.

d.
Apprenticeships

We turn, finally, to the district court's contempt sanctions with regard to apprenticeship programming. A large part of the district court's reasoning depended on its findings that the defendants had violated the remedial plans and this, as we have already explained, is not a proper foundation for contempt sanctions.

The district court also asserted, however, that an order it issued in 1993 required the defendants to actively recruit inmates for apprenticeships, rather than simply to post availability notices, and on this basis, it also found the defendants in contempt. We must disagree. The order in question reads in pertinent part as follows:

> Although plaintiffs may not specifically raise this issue, I shall take this opportunity to express my displeasure with defendants' procedures of communicating information about apprenticeship openings to the inmates . . . . Simply posting a notice on a bulletin board for two weeks advertising the opening of an apprenticeship, or engaging in very informal and verbal notification of such openings, is insufficient. Defendants must somehow attempt to motivate the inmates to apply for an apprenticeship opening. . . . While I am not ordering defendants to create yet another comprehensive plan . . . , I am strongly urging the Department of Corrections to show more

> willingness to adhere to its purpose as reflected in its name: correct the problem. The problem, perhaps, is the inmates' lack of motivation to apply for such apprenticeships because, in part, they are unaware of the benefits gleaned from a meaningful apprenticeship. Merely posting a flyer announcing an opening in an apprenticeship program to inmates unaware of its positive aspects is an insufficient attempt to correct the problem.

(Emphasis added.) We find several elements of this order disturbing. In the first place, noncompliance with the terms of this order is not a proper basis for a finding of contempt and the imposition of sanctions because, as the ruling itself states, it does not "order" the defendants to do anything. The defendants cannot be held in contempt and fined for failure to heed what the district court "strongly urg[ed]"; a party may be found in contempt for disobedience of a court's lawful order, but not for disregarding its "urging."

More fundamentally, however, we view this order as an example of the loss of focus in these proceedings. It is beyond peradventure that constitutional equal protection mandates do not require the defendants to "motivate" inmates into expressing interest in apprenticeship programs. The district court is not, and is not expected to be, an expert in matters of the inmates' interests. The appeal of an apprenticeship to inmates, and the psychosocial reasons why inmates may not be prepared to take advantage of certain programs, are matters to be left to the exclusive domain of the State, not the federal courts. In engaging in this type of judicial micro-management, the district court far exceeded its authority.

2.

Because we affirm only one small part of the district court's contempt order, it is necessary to remand to allow the district court to redetermine appropriate sanctions.

IV.
ATTORNEY FEES

We turn, finally, to the third of the consolidated appeals: the district court's award of attorney fees to the plaintiffs. This appeal presents two issues for our consideration: whether the district court (1) erred in concluding that the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996), does not apply to limit the fees incurred by the plaintiffs between July and December 1995, or (2) abused its discretion in awarding attorney fees to the plaintiffs for certain categories of work. We conclude that the district court correctly resolved the issue regarding the applicability of the PLRA. We also conclude that the court did not abuse its discretion with respect to most of the attorney fees it ordered. However, we will vacate that part of the court's order awarding fees for advocacy by the plaintiffs' attorneys on behalf of inmates who were allegedly retaliated against by the defendants as a result of their participation in this lawsuit, because, with respect to that award, the district court abused its discretion.

A.

In 1985, the district court entered the following order with respect to attorney fees:

> IT IS HEREBY ORDERED that Plaintiffs are entitled to attorney fees and that requests for such fees shall be submitted to opposing counsel every six months. Defendants will have twenty-eight days in which to contest the amount of the fee request.

The defendants stipulated to entry of this order.

The district court subsequently interpreted this order as meaning the plaintiffs were entitled to attorney fees for post-judgment matters, irrespective of whether they actually prevailed on a particular issue:

> I will not now revisit the decision to award plaintiffs post-judgment attorney fees. The

> parties stipulated to the entry of this order four years ago, and since then have abided by their agreement. While 42 U.S.C. § 1988 does provide that prevailing parties in civil rights suits may receive attorney fees, defendants should have voiced this objection in 1985. Neither this statute nor my order requires me to redecide the prevailing party issue every six months throughout this prolonged litigation. Rather, the order states plaintiffs are entitled to attorney fees.

And in 1987, the court ruled, in response to a number of objections by the defendants regarding attorney fees, that its 1985 order entitled the plaintiffs to attorney fees for any activity related to "monitoring" the defendants' compliance: "Plaintiffs' counsel are charged with responsibility for monitoring compliance with this Court's judgment requiring parity of programming between male and female inmates in the custody of the Michigan Department of Corrections."

On February 1, 1996, the attorneys for the plaintiffs sent a letter to defense counsel communicating their fees and costs for the six-month period between July 1 and December 31, 1995. Attorney Michael Barnhart submitted billing records totaling 122.90 hours, and attorney Deborah LaBelle submitted billing records totaling 497.15 hours. On February 27, the defendants responded, objecting generally to a number of charges, but without any elaboration. The objections that are at issue in this appeal are objections to work relating to several appeals to this court filed by the defendants; fees for conferences between Barnhart and LaBelle that the defendants assert amount to "double billing"; and "any fees in non-*Glover* related issues."

On March 11, 1996, the plaintiffs filed their petition for attorney fees incurred between July 1 and December 31, 1995. With respect to the so-called double-billing issue, the plaintiffs' petition specifies:

> Defendants' objections list dates of alleged consultation between counsel. Two of the listed dates for Ms. LaBelle do not concern any

> communication, discussion or meeting with Michael Barnhart. (11/12/95, 11/15/95). The remaining dates total 13.70 hours for a six-month time period in which counsel spent conferring, discussing and dividing issues in this case.

The defendants' response did not dispute or otherwise even address these assertions. Indeed, their district-court brief with regard to this issue simply stated:

> Counsel for Plaintiffs, on numerous occasions, have repeatedly told the Court that there has been a definitive assignment of duties and no duplication should take place. Defendants once again object to the repeated duplication of attorneys [sic] fees set forth by Plaintiffs' counsel. Such objections are not waived nor barred by Plaintiffs' reliance on this Court's [prior decisions], which dealt specifically with the factual issues presented to the Court solely at that time. Despite Plaintiffs' counsels' protestations to the contrary, the prior rulings on separate attorney fees issues are not controlling.

The defendants' only other support for their claim that plaintiffs' counsel were "double billing" was the attachment of their February 27 letter.

On April 26, 1996, the Prison Litigation Reform Act of 1995 was signed into law. Certain provisions of the PLRA relate to attorney fees in prison litigation. On May 7, 1996, the defendants filed a supplemental brief, inviting the court's attention to the existence of the PLRA, and arguing that its attorney-fee provisions should have retroactive effect with respect to the plaintiffs' then-pending petition for attorney fees.

On May 9, 1996, the district court held a hearing on the plaintiffs' petition, and on May 31, 1996, it entered an opinion and order. Rejecting the defendants' argument that the PLRA applied to the plaintiffs' attorney-fee request, the court then

addressed the defendants' specific objections to particular fees. It first rejected the defendants' objections to fees for time spent by plaintiffs' counsel in consultation with each other:

> [Defendants] object to time spent by Deborah LaBelle and Michael Barnhart, counsel to the plaintiff class, in consulting, conferring, or discussing matters between themselves. The hours objected to are thirteen in a period of six months between July 1, 1995[,] through December 31, 1995. Again, as I have in the past, I find that these hours[,] "given the magnitude and the complexity of this case, . . . [are] at least reasonable and probably necessary."

(Citations omitted.)

Next, the court rejected the defendants' argument that they should not be responsible for fees in connection with an aborted appeal of various orders:

> Defendants object to the payment of fees incurred in the . . . Sixth Circuit . . . . These [three] appeals all stemmed from this court's orders establishing a Compliance Committee in order to achieve finality in this case. It was this court's purpose, because of the excessive litigiousness that surrounded compliance with this court's orders, that a new approach be taken. That approach was to "take the lawyers out of the case" and have the Wardens of the two women's prisons, the Special Administrator, the Court Monitor and a representative of the plaintiff class meet and resolve these complex issues. The procedure adopted by this court began to founder . . . and, thus, it was necessary to disband this approach. When the court vacated its orders establishing the Compliance Committee, plaintiff[s'] counsel filed a motion to dismiss these appeals that the court's order had generated. Initially the defendants opposed the dismissal but then, on stipulation, agreed to voluntarily dismiss the appeals. This was done only after the submission of briefs in the Sixth Circuit.
>
> Even though defendants objected to the court's orders for a Compliance Committee . . . and appealed these orders, which they subsequently voluntarily dismissed, they argue that the plaintiff class is not the prevailing party and, therefore, the fees cannot be ordered paid.
>
> The argument is rejected, and the defendants are ordered to pay all fees in Appeal Case Nos. 95-1903, 95-2037 and 95-2120.

Finally, the district court rejected the defendants' objections as to payment for "non-*Glover*" issues:

> Defendants object to the payment of 11.15 hours, which they argue concerns issues not related to the *Glover* case. It appears that defendants are engaged in hair-splitting. One so-called non-*Glover* issue arose out of a claim of retaliation by an inmate, a member of the class who claimed that her jewelry had been confiscated as contraband after she participated in this case; and another inmate similarly situated was apparently removed from her prison detail. Plaintiffs' class counsel pursued these matters with defendants' counsel, and I am informed that both these actions were reversed. Another claimed issue on retaliation involved complaints with regard to excessive heat at Camp Branch. The complainants were two women inmates who received "misconducts" for complaining; and, when plaintiffs' class counsel brought this issue to defendants' counsel, the two women inmates did receive rehearings and their "good time" credits were restored. A third so-called non-

> *Glover* issue involved plaintiffs' class counsel Michael Barnhart's appearance at legislative hearings. Barnhart appeared at the legislative hearings because matters regarding the *Glover* case were discussed by the Director of the Department of Corrections. It appears to me that Barnhart properly acted in monitoring these matters inasmuch as they relate directly to this case.
>
> Thus, the objection of defendants to the payment of 11.15 hours to plaintiffs' class counsel is overruled.

The defendants filed a timely appeal of this order. They also filed a motion for approval of a bond staying payment of the attorney fees. While the plaintiffs agreed to a bond for part of the attorney fees, they took the position that the defendants should have to pay the undisputed amount, covering 228.40 hours. The district court agreed with the plaintiffs' position, and entered one order on July 12 allowing the defendants to post a bond for part of the amount they owed $74,935.40 but simultaneously entered another order directing payment by July 19 of $33,127.51, for what it termed "undisputed fees and costs."

The defendants did not pay this amount, but before they filed a notice of appeal, the district court four days after the July 19 deadline issued an order to show cause why the person responsible for compliance should not be held in contempt, and set a hearing for August 2. The district court also set a show-cause hearing for the same date with respect to the defendants' failure to file the stay bond that had been approved.

The defendants then filed a motion for a stay of all the orders at issue: the original attorney-fee order, the bond order, the order directing payment of some attorney fees, and the two show-cause orders. This court granted the motion on July 30, 1996. After entry of the stay, the defendants filed a notice of appeal of the orders from which they had not yet appealed. These appeals were then consolidated by this court.

B.

1.

As a general matter, attorneys for plaintiffs pursuing actions under 42 U.S.C. § 1983 are entitled to attorney-fee awards pursuant to the guidelines of 42 U.S.C. § 1988:

> In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988(b). This statute, however, must now be read in conjunction with the PLRA, which took effect on April 26, 1996, at the time it was signed into law. See *Wright v. Morris*, 111 F.3d 414, 417 (6th Cir.), *cert. denied*, 118 S. Ct. 263 (1997). Section 803(d) of the PLRA provides the following with respect to attorney fees in prisoner suits:

> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that
>
> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and
>
> (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.

42 U.S.C. § 1997e(d) (emphasis added).

The defendants have argued that the underscored portions of the PLRA affect this case. They claim, first, that the plaintiffs did not "establish[] how each hour they charged was directly and reasonably incurred in proving an actual violation of constitutionally protected rights," see 42 U.S.C. § 1997e(d)(1)(A) & (B)(ii), and second, that the plaintiffs should be limited to an hourly rate of $112.50 pursuant to section 1997e(d)(3). This challenge raises a purely legal question of the retroactivity of the PLRA, that is, a question of statutory interpretation. Our review is, accordingly, de novo. See *United States v. TRW, Inc.*, 4 F.3d 417, 421 (6th Cir. 1993); see also *Borregard v. National Transp. Safety Bd.*, 46 F.3d 944, 945 (9th Cir. 1995); *cf. Freeman v. Laventhol & Horwath*, 34 F.3d 333, 342 (6th Cir. 1994).

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court established the analytical approach we

must follow. *Landgraf* instructs that we first determine whether Congress "expressly prescribed the statute's proper reach." *Id.* at 280. Absent an express command that a statute operates retroactively, a "traditional presumption" against retroactivity comes into play so that the statute will not be applied. *Id.*; see *Wright*, 111 F.3d at 418; *Jensen v. Clarke*, 94 F.3d 1191, 1202 (8th Cir. 1996).

Adequate authorization for a truly retroactive effect exists only where there is "statutory language that [is] so clear that it c[an] sustain only one interpretation." *Lindh v. Murphy*, 117 S. Ct. 2059, 2064 n.4 (1997). As an initial matter, then, we find it plain that this type of clear statutory directive is absent from the PLRA's attorney-fee provision. See *Jensen*, 94 F.3d at 1192. But see *Alexander S. v. Boyd*, 113 F.3d 1373, 1385-86 (4th Cir. 1997). Section 803(d) simply provides that in any action brought by a prisoner in which attorney fees are authorized under 42 U.S.C. § 1988, such fees "shall not be awarded," except as provided therein. Given the high stakes of the retroactivity question, it would be surprising for Congress to express such an intent by merely stating when attorney fees "shall not be awarded"; we would instead expect some explicit reference that the statute was to apply in the generally disfavored retroactive way.

We therefore turn to whether application of section 803(d) to an award of attorney fees for legal assistance completed prior to enactment of the PLRA results in an impermissible retroactive effect. Retroactive effect means more than that the statute is applied to pre-enactment conduct, or that it "upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269 (footnote omitted). Rather, we must inquire whether the new statute "'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.'" *Id.* (citation omitted). In other words, we must ultimately ascertain "whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 270.

Although "'the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took

place,'" *id.* at 265 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)), in certain circumstances a court will instead "apply the law in effect at the time it renders its decision," *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974). The defendants argue that the latter principle should apply here, and that the presumption against retroactivity is no bar to the determination of attorney fees because such determinations are collateral to the underlying cause of action. We disagree.

Bradley presented almost the converse of the situation here. There, the district court had awarded attorney fees to parents who had prevailed in a school desegregation case, relying on general equitable principles to do so. While the appeal from that decision was pending, Congress passed a statute allowing for an award of attorney fees in school desegregation cases. The Supreme Court held that this statute applied to the pending case, reasoning that to do so did not "result in manifest injustice." *Id.*

The reasoning and result in *Bradley*, however, do not dictate that the PLRA be applied here, given the key distinction between the cases. There was no manifest injustice in applying the new fee statute in *Bradley*, given that fees had already been awarded under an alternative theory; the legal theory for an award may have changed, but the fact of the award did not itself present any surprise to the defendants. Here, in contrast, application of the attorney-fee provisions to a fee motion that was pending at the time of the PLRA's passage and that pertained solely to work performed before the statute's passage would undeniably work an impermissible retroactive effect. Throughout 1995, the inmates' attorneys presumably expected that, as the court had ordered, they would be reimbursed for their monitoring work under 42 U.S.C. § 1988 at the then-established rate. Application of the PLRA in determining the attorney fees would frustrate those expectations. Further, the parameters of the attorney-fee statute in effect at the time legal services are requested clearly affects the relationship between the prisoners and their attorneys, including whether an attorney chooses to provide legal assistance in the first place. But see *Alexander*, 113 F.3d at 1387 n.12.

Indeed, application of the PLRA's attorney-fee provisions where the prisoners' attorneys have reasonably conformed their conduct in reliance on the older provisions of 42 U.S.C. § 1988 would confound the very policy underlying the presumption against retroactivity: "In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Landgraf*, 511 U.S. at 265-66. Accordingly, we hold that allowing the PLRA's limitations on attorney fees to alter the standards and rate for awarding fees for legal work completed prior to passage of the PLRA results in an impermissible retroactive effect by attaching significant new legal burdens to the completed work, and by impairing rights acquired under preexisting law. See *Cooper v. Casey*, 97 F.3d 914, 921 (7th Cir. 1996). A contrary conclusion would be repugnant to "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf*, 511 U.S. at 270.

As an aside, we note that in dicta, the Court in *Landgraf* stated that attorney-fee determinations are "'collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.'" *Id.* at 277 (quoting *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451-52 (1982)). The labeling of attorney fees as "collateral," however, does not suggest that the presumption against retroactivity should not apply to new attorney-fee provisions. In classifying attorney-fee determinations as "collateral," the Court linked them to their sister class of cases those involving new procedural rules. See *id.* at 275-77. Generally, courts may apply new procedural rules to cases arising before their enactment without triggering concerns about retroactivity because "rules of procedure regulate secondary rather than primary conduct." *Id.* at 275. The Court nevertheless recognized that "the mere fact that a new rule is procedural does not mean that it applies to every pending case." *Id.* at 275 n.29 (emphasis added). Rather, "the applicability of such provisions ordinarily depends on the posture of the particular case." *Id.* In other words, laws regulating litigation conduct often impact the substantive rights of the parties as well. *Cf. Hughes Aircraft Co. v. United States*, 117 S. Ct. 1871, 1878 (1997). Similarly, a law governing attorney-fee provisions may also affect the substantive rights of the parties and in this

instance, as we have explained, it does.

We note, finally, that our holding does not address the effect of the PLRA's fee-limitation provisions on attorney fees for post-PLRA-enactment work rendered in a case that was pending at the time of enactment. See *Landgraf*, 511 U.S. at 289 (Scalia, J., concurring). The issue whether fees earned by the plaintiffs' attorneys after April 26, 1996, will be limited by the PLRA is not before us in this appeal, and we have no occasion to address it.

2.

The defendants' second argument takes issue with particular aspects of the plaintiffs' attorney fees. "A district court's award or denial of attorney's fees is reviewed for abuse of discretion." *Cramblit v. Fikse*, 33 F.3d 633, 634 (6th Cir. 1994) (per curiam). "This deference[] 'is appropriate in view of the district court's superior understanding of the litigation[.]'" *Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 909 (6th Cir. 1991) (citation omitted).

a.

The defendants argue that the plaintiffs are not entitled to attorney fees for work done in connection with proceedings collateral to the main action when the plaintiffs did not prevail in those collateral proceedings. Specifically, the district court awarded certain relief in 1995, from which orders the defendants appealed. While the appeals were pending, the district court vacated the orders. Although the defendants initially appealed the order vacating the prior orders, they later filed a stipulation of voluntary dismissal of their appeals. The defendants now argue that the plaintiffs were not the prevailing parties with regard to those appeals, and that the defendants should not, accordingly, be liable for any attorney fees and costs.

We have already rejected a virtually identical argument in a previous *Glover* appeal. There, the defendants had argued that the plaintiffs were not entitled to attorney fees for their work on various contempt motions because they could not be "prevailing parties" with respect to those motions until and

unless this court heard the appeal and ruled in the plaintiffs' favor. We said then:

> Defendants claim the district court erred in awarding attorneys' fees without determining whether plaintiffs were prevailing parties. They contend that plaintiffs are not prevailing parties under 42 U.S.C. § 1988 until this court reviews the district court's finding of contempt because compliance with the court's 1979 and 1981 orders is the sole issue, and plaintiffs cannot establish the degree of success required to be a prevailing party entitled to a fee award until this court decides the contempt issue.
>
> . . . .
>
> The district court has the discretion to award the prevailing party in a civil rights action reasonable attorneys' fees. We reject the argument that the filing of a contempt motion to compel compliance with the court's previous orders is something other than monitoring, which is a compensable activity under section 1988. . . .
>
> In bringing the contempt motion, plaintiffs were seeking defendants' compliance with the district court's 1979 and 1981 orders in which plaintiffs were prevailing parties. The district court did not abuse its discretion in finding plaintiffs were entitled to attorneys' fees.

Glover, 934 F.2d at 715-16 (citations omitted).

The defendants rely heavily on our decision in *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979), claiming that *Northcross* held that fees may not be awarded for work on collateral matters. The only passage in that case even remotely speaking to this issue is the following:

> The hearings here involved were collateral to and distinct from the desegregation suit

> itself, which had been finally terminated in 1974, so had the plaintiffs failed to prevail on the merits the district court would have been justified in denying fees altogether.

Id. at 641. Noting that this risk created a "real element of contingency as to whether the attorneys would be compensated for their services at all," *id.*, the Northcross court approved a 10% increase for the fees in question. Obviously, this does not support the defendants' position in the slightest. In the first place, it is dicta. In the second, it does not purport to create a rule that collateral matters cannot be compensated unless plaintiffs prevail on those matters; it simply declares that a court is "justified" in not compensating them under those circumstances.

We find the defendants' argument to be without merit. The plaintiffs should be compensated for their work in connection with the appeal of the Compliance Committee matter, both because the defendants' voluntary dismissal of the appeal in effect made the plaintiffs prevailing parties, and because that appeal clearly constituted a "monitoring" matter within the meaning of this court's earlier *Glover* opinion.

b.

The defendants next argue that the district court improperly allowed an award for 40 hours of time spent by counsel in discussing the case. They contend that the district court misunderstood their arguments in this respect, and incorrectly characterized it as an argument about 13 hours of time. They argue that discussing the case for some period of time is reasonable, but 40 hours is excessive. The plaintiffs respond that there is no evidence in the record supporting an argument that the plaintiffs' counsel spent 40 hours discussing the case, or that the defendants ever made an objection to 40 hours of discussion. The defendants' letter to the plaintiffs simply refers to a number of fee-entry dates which they contended represented duplicate billings, and does not identify a total number of hours objected to. Moreover, the plaintiffs argue, of the dates identified by the defendants as containing objectionable conferences, two do not contain any reference to consultations, and the remainder add up to 13

hours billed by each attorney for consultations.

The defendants again rely almost entirely on *Northcross*, 611 F.2d 624, suggesting that Northcross stands for the proposition that district courts should deduct for any duplicative hours. Suffice it to say that *Northcross* does not stand for this proposition. The court in *Northcross* noted that a court may exercise its discretion to "cut [hours] for duplication, padding or frivolous claims. In complicated cases, involving many lawyers, we have approved the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services." *Id.* at 636-37. There is, obviously, an enormous difference between approving such a course of action in a particular case and establishing a rule that such a course is required. There is, moreover, nothing in Northcross that suggests that the mere fact of attorneys conferring with each other automatically constitutes duplication.

We note, too, that as with the defendants' previous argument, we have already rejected the same type of double-billing/consultation argument that the defendants raise now, finding no abuse of discretion in the district court's compensation of plaintiffs' counsel for consultation that was "'reasonably proportionate to their total hours.'" See *Glover*, 934 F.2d at 717 (citation omitted). We note further that we have consistently held a party complaining about attorney fees to a burden of stating their complaints with particularity:

> Ideally, a party should raise objections with specificity, pointing out particular items, rather than making generalized objections to the reasonableness of the bill as a whole. The defendants' failure to raise more than a generalized objection to the fees in this case would ordinarily require us to review only those items which should have been eliminated through a cursory examination of the bill. Since we are remanding the case for reconsideration of the fee award, we see no reason why the defendants should not be permitted to raise further specific objections.

Wooldridge v. Marlene Indus. Corp., 898 F.2d 1169, 1176 n.14 (6th Cir. 1990) (citation omitted).

In sum, we reject the defendants' complaint with respect to the alleged duplication of effort. The defendants have failed to provide even minimal support for their allegations, and we are simply left with no basis for concluding that the district court abused its discretion in finding that amount of consultation reasonable, especially given that we earlier approved the district court's actions in the face of a virtually identical complaint by the defendants.

c.

The defendants' final argument is that the district court should not have allowed an award for time spent by plaintiffs' counsel on activities such as intervening on behalf of inmates who received misconduct tickets for rule violations, or complaining about whether the inmates had ice or heat at particular times. These activities, defendants contend, are completely outside the ambit of this case. While the plaintiffs claim that these incidents all constituted "retaliation" by the defendants against inmates involved in this case, and thus give rise to legitimate post-judgment monitoring, the defendants point out that there has never been a finding of retaliation against any female inmate in connection with this case.

With respect to this argument, we will reverse and remand. While it is possible that the plaintiffs' attorneys' efforts constituted legitimate monitoring, we find it disturbing that there is nothing in the record to evidence their claims that the defendants' actions were retaliatory in nature. Before the district court approves such fees, there must be an explicit finding that the fees were related to the underlying case.

V.

SUMMARY AND CONCLUSION

We intend by the rulings we make today to materially assist in bringing to a close the federal court's supervision of the Michigan women's prison system. We do so, in the last analysis, by redirecting the attention of all concerned to the

issues that divided the parties when the case was filed nearly 20 years ago. The district court has struggled mightily and with an admirable show of patience in an effort to bring about educational and vocational parity of opportunity and the level of access to the courts it thinks are required by the United States Constitution. It has not succeeded.

The parties, as between themselves, and the defendants, vis-a-vis the district court, are light-years apart in their conceptions of what the Fourteenth Amendment Equal Protection Clause requires concerning parity in educational and vocational opportunities for men and women inmates. And we are not particularly surprised. Not a single federal appellate court in the nation has ever held that a lack of parity with respect to educational or vocational opportunities between male and female inmates is a violation of the Equal Protection Clause of the Fourteenth Amendment not before this case was filed in 1979 or ever since. Indeed, the Eighth Circuit has flatly rejected the constitutional validity of such an exercise:

> [T]he programs at [the Nebraska State Penitentiary, a male prison,] and [the Nebraska Center for Women, a female prison,] reflect separate sets of decisions based on entirely different circumstances. When determining programming at an individual prison under the restrictions of a limited budget, prison officials must make hard choices. They must balance many considerations, ranging from the characteristics of the inmates at that prison to the size of the institution, to determine the optimal mix of programs and services. Program priorities thus differ from prison to prison, depending on innumerable variables that officials must take into account. In short, NSP and NCW are different institutions with different inmates each operating with limited resources to fulfill different specific needs. Thus, whether NCW lacks one program that NSP has proves almost nothing.

Indeed, as between any two prisons, there

> will always be stark differences in programming. Assuming that all prisons start with adequate yet limited funding as we must here, because the plaintiffs do not claim that NCW is subject to discriminatory funding officials will calibrate programming differently in each prison, emphasizing in one prison programs that they de-emphasize in others. Thus, female inmates can always point out certain ways in which male prisons are "better" than theirs, just as male inmates can always point out other ways in which female prisons are "better" than theirs. Comparing an isolated number of selected programs at NSP and NCW is thus a futile exercise. At bottom, using an inter-prison program comparison to analyze equal protection claims improperly assumes that the Constitution requires all prisons to have similar program priorities and to allocate resources similarly.

Klinger v. Department of Corrections, 31 F.3d 727, 732 (8th Cir. 1994) (citations and footnote omitted); accord *Women Prisoners v. District of Columbia*, 93 F.3d 910, 924-27 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 1552 (1997). See generally *Keevan v. Smith*, 100 F.3d 644 (8th Cir. 1996).

Thus, the district court here has for many years sought to remedy a constitutional violation of dubious validity, but we do not and, indeed, may not question the district court's underlying judgment because the defendants never appealed it. Therefore, we have been left with the duty to review only the district court's many remedial orders and judgments, most of which determine whether its previous orders and judgments designed to achieve parity have been obeyed. Similarly, the district court's 1979 judgment that the female inmates have been denied constitutionally required access to court was never appealed and our subsequent appellate activity with respect to that issue has likewise been limited for the most part to reviewing the propriety of the ever-expanding detail of the district court's compliance orders.

Now it is time to return to the issue that was litigated

and adjudicated in 1979 and to determine whether, now, there exists a denial of equal protection of the law in the provision of educational and vocational opportunities for female inmates, and whether, now, female inmates are being denied the level of access to court that is required under the First Amendment. We hasten to observe that although our holding today does not call into question the district court's 1979 judgment, it does require that a judgment be made as to the conditions as they exist now not as measured by the many implementing orders and suggested remedial plans that have been in this case since 1981, but as measured by the Equal Protection Clause of the Fourteenth Amendment and the access-to- court requirements of the First Amendment as authoritatively interpreted.

As to the first of the appeals consolidated here for review, 95-1521, we hold that the district court's judgment denying the defendants' motion to terminate continuing district court jurisdiction is VACATED and the matter is REMANDED for further proceedings consistent with this opinion. We shall retain jurisdiction with respect to this appeal only.

The district court's judgment in appeal number 96-1931, finding the defendants in contempt of court and imposing sanctions, is AFFIRMED in part and REVERSED in part, and this matter is REMANDED for further proceedings.

Finally, the district court's judgment awarding attorney fees, under consideration in appeal numbers 96-1852 and 96-1948, is AFFIRMED in part and REVERSED in part, and the matter is REMANDED for further proceedings.

CONCURRING IN PART, DISSENTING IN PART

HARRY W. WELLFORD, Circuit Judge, concurring in part and dissenting in part. Judge Ryan has done a commendable job in examining and dealing with the extended and complex issues involved in this case. I write separately to address those issues of particular concern to this judge who,

like many of my colleagues, has been called upon to address a number of appeals dealing with what I characterize as micromanagement of the Michigan prisons and penal system by the experienced district judge involved in this appeal and other Michigan district judges. This case alone has generated numerous appeals, very substantial legal expense, and has occasioned a recent appeal to, and decision by, another panel on other aspects of this bundle of controversies, styled *Mary Glover, et al. v. The Director of Prisons, et al*[1] This case and *Hadix* have been litigated for more than twenty years, and the *United States v. Michigan* case for nearly fifteen years. Enormous state resources and administrative efforts have been expended to deal with these lawsuits and injunctive actions.

I. ATTORNEY FEES

A. Effect of Prison Litigation Reform Act ("PLRA," 42 U.S.C. § 1997e(d) et seq.)

Appellate cases Nos. 96-2586/2588/97-1218/1272 involved plaintiffs' fee claims and the effect of PLRA on these claims. *Hadix v. Johnson*, Nos. 96-1851/1943/1908/1907, also involved, in part, plaintiffs' attorney's fee claims. We have held that the 1997e(d) cap on fees does not apply to legal work otherwise covered performed prior to the enactment of PLRA.

I feel strongly, however, that the Fourth Circuit was correct in *Alexander v. Boyd*, 113 F.3d 1373 (4th Cir. 1997),

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[1] Apart from numerous appeals in Glover, there have also been a number of appeals in *Hadix v. Johnson*, another Michigan prisoner class action, in which an appeal is pending, (Nos. 96-1851/1907/1908/1943). In addition, still another panel has recently decided an appeal in *United States v. State of Michigan*, No. 96-2464, dealing with a consent decree and compliance plan regarding prison conditions in Michigan. Still other prisoner retaliation claims have recently come before us on appeal based on a cursory examination of our docket: *Thaddeus X v. Blatter*, No. 95-1837 (now under en banc consideration), and *White v. McGinnis*, No. 96-2221 (6th Cir. Dec. 10, 1997). See also the recent class action Michigan prisoner visitation case, *Bazzetta v. McGinnis*, Nos. 95-2181/96-1559 (6th Cir. Sept. 4, 1997 and Jan. 5, 1998). See also *Hadix v. Johnson*, Nos. 96-2643/2582, 1998 WL 7150 (6th Cir. Jan. 13, 1998) (PLRA is constitutional).

that the Act and its cap on fees applies to work completed before enactment of the PLRA but awarded after such enactment. I find the statutory language in that respect unambiguous--fees "shall not be awarded" except as the statutes provides. "[A]pplication of an attorney fees provision to ongoing litigation is arguably not retroactive." *Landgraf v. USI Film Products*, 511 U.S. 244, 289 (1994) (Scalia, J., concurring). I would count attorney fee applications as collateral to the underlying merits and procedural in nature. See *Landgraf*, 511 U.S. at 275-77. Being procedural, a change in fee rate may be effectuated retroactively by PLRA, and certainly if the work is merely of a paralegal-type function.

The PLRA is even more clear that its fee limitation provisions apply to work rendered on a pending case after its enactment. There is, in such a situation, no reasonable argument on the part of plaintiffs' counsel that under the plain language of the limitation, after it became law, that counsel could expect to continue to be compensated at a rate higher than the statute allows. A contrary holding means that the statutory limitation is to be ignored for legal work performed after its enactment (and clear expression of congressional intent) in a pending case such as this where "the end does not appear in sight." I find nothing in the statute's legislative history that suggests it is not to apply to pending cases, at least as to legal work performed after its enactment.

I would require, moreover, that as to each substantial issue in dispute for plaintiffs to establish entitlement to what should be a statutorily limited fee, they must show that they are a prevailing party and have entitlement on that issue. Otherwise, plaintiffs are court encouraged in this case to pursue new and even expanding areas of claims against the state, such as furnishing a counsel at state expense to female prisoners (not male prisoners) in civil custody and domestic relations cases in state courts. See our recent decision *Glover*

v. Johnson, 75 F.3d 264 (6th Cir. 1996).[2]

I must therefore DISSENT on the attorney's fee issue as to construction of PLRA and its limitations.

B. Other Attorney's Fee Holdings

What has been said in section A above I would reiterate as to what I consider collateral attorney's fee claims, particularly on matters such as we addressed in *Glover v. Johnson*, 75 F.3d 264 (6th Cir. 1996). It is a time in this litigation (as well as in *Hadix)* to take seriously the congressional concerns with ever-expanding federal court involvement in prisoner litigation as reflected in the PLRA. Congress clearly intended to restrict and limit such litigation, and federal court involvement at state expense and to put a cap on attorney's fees to be awarded prisoner representatives.

I would call upon the district courts to examine very carefully so-called monitoring fees of counsel and persons designated by the courts to serve as a kind of prison overseer on ombudsmen. Potential for excessive claims and charges to the state treasury is plainly implicated. I concur in the majority decision that vacates fee awards for "advocacy by plaintiffs' attorneys on behalf of inmates who were allegedly retaliated against by the defendants."

I would also disallow one-half of the thirteen plus hours' time charge claimed by plaintiffs' attorneys in "consulting, conferring and discussing matters" together as representing duplication of effort or double charging.

II. VOCATIONAL PROGRAMMING

I would also DISSENT from the affirmance of a contempt finding for offering and maintenance of four

[2] It is interesting to note that the district court apparently ignored our decision in that case in an order dated January 31, 1997, on the purported authority of *MLB v. SLJ*, ___ U.S. ___, 117 S.Ct. 555 (1996). *MLB v. SLJ* mandates a pauper parent in a civil appeal an appellate record at state expense. It does not deal with requiring a state to furnish female prisoners counsel in civil cases having to do with domestic relations or child custody. Plaintiffs, no doubt, will be seeking attorney's fees at a rate exceeding the PLRA for such legal services expressly held not to be mandated by our court.

vocational programs instead of six ordered by the district court. There was inadequate proof, in my opinion, that defendants willfully and contumaciously acted to deprive female prisoners of reasonable vocational opportunities commensurate with the greater number of programs offered to the far greater number of male prisoners in a much higher number of male prison facilities. Taking into account geographic differences in locations, demonstrated interest, work experience, and financial burdens involved in maintaining a small program for women prisoners, I would conclude that there was no reasonable basis for a contempt finding on this issue.

I add but one more observation about what relief may be mandated in this extended controversy and the other related prison cases in Michigan. Prisoners are entitled to relief only when they show constitutional violations by prison authorities. It seems to me that "entitlements" to desirable educational, vocational, and administrative benefits have been the norm in Michigan prison cases rather than constitutional mandates. This case is not about denial of access, education, and vocational opportunity to female prisoners, but rather about the extent of such opportunities in relation to those which may have been offered to men in some Michigan male penal institutions.

I have expressed relatively narrow disagreement, except as to applicability of PLRA and fees, in the extensive majority opinion. In general, I have concurred because it covers the real issues with discernment.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20549-0001

November 16, 1998

Thomas L. Casey, Esquire
Solicitor General
P.O. Box 30212
Lansing, MI 48909

Re: 98-262 - *Perry Johnson, et al. v. Everett Hadix, et al.*

Dear Mr. Casey:

The Court today entered the following order in the above stated case:

> "The petition for a writ of certiorari is granted limited to the following questions: 1. Whether, in litigation pending on the effective date of the Prison Litigation Reform Act, the attorney fee provision of the PLRA Sec. 803(d), 42 U.S.C. Sec. 1997e(d), applies to fees awarded after the Act's effective date for services rendered after that date. 2. Whether, in such litigation, this fee provision applies to fees awarded after the Act's effective date for services rendered before that date."

WILLIAM K. SUTER, CLERK

Denise J. McNerney
Administrative Assistant
to Clerk